90-387

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LION UNIFORM, INC., JANESVILLE APPAREL DIVISION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Under the Equal Access to Justice Act, an agency that conducts an adversary adjudication must award attorney's fees to a prevailing private party, "unless the adjudicative officer of the agency finds that the position of the agency was substantially justified." 5 U.S.C. § 504(a)(1). In *Pierce v. Underwood*, 487 U.S. 552 (1988), this Court held, under a parallel provision of the Equal Access to Justice Act, that a district court's fee award is reviewable only for abuse of discretion and that a court of appeals has no authority to make *de novo* findings concerning "substantial justification."

The question presented is:

Whether an agency may overturn an adjudicative officer's fee award on the basis of its own *de novo* finding, directly contrary to the finding of the adjudicative officer, that the agency's position was substantially justified.

PARTIES AND AFFILIATED COMPANIES

All parties to the proceeding below are named in the caption.

Petitioner Lion Uniform, Inc., Janesville Apparel Division has no parent company and no subsidiary.

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Lion Uniform, Inc., Janesville Apparel Division petitions for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a)[1] is reported at 905 F.2d 120. The order of the National Labor Relations Board on petitioner's fee application under the Equal Access to Justice Act (App. 12a-60a) is reported at 285 N.L.R.B. 249. The order of the Board's adjudicative officer awarding attorney's fees (App. 61a-101a) is reported at 285 N.L.R.B. 265. The Board's orders concerning the underlying labor dispute are reported at 259 N.L.R.B. 1141 and 247 N.L.R.B. 992.

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[1] "App." refers to the Appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1990 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

5 U.S.C. § 504 provides in relevant part:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.
>
> . . . .
>
> (3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.
>
> (b)(1) For the purposes of this section—
>
> . . . .
>
> (D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a

hearing officer or examiner, or otherwise, who presided at the adversary adjudication . . . .

(c) . . . .

(2) If a party other than the United States is dissatisfied with a determination of fees and other expenses made under subsection (a), that party may, within 30 days after the determination is made, appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court's determination on any appeal heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.

STATEMENT

When a qualified individual or small business prevails in an adversary adjudication before a federal agency, the Equal Access to Justice Act ("EAJA") requires the agency to award fees and expenses "unless the *adjudicative officer* of the agency finds that the position of the agency was substantially justified." 5 U.S.C. § 504(a)(1) (emphasis added). In this case, the adjudicative officer found that the position of the agency was *not* substantially justified; he accordingly awarded attorney's fees to petitioner. The agency nonetheless overturned the fee award on the basis of its own *de novo* determination that the position of the agency in the underlying adjudication *was* substantially justified.

In *Pierce v. Underwood*, 487 U.S. 552 (1988), involving a parallel provision of the EAJA, this Court held that a court of appeals must review a district court's award of attorney's fees under an abuse-of-discretion

rather than a *de novo* standard. The Court relied in part on statutory language specifying that "the [EAJA] determination is for the district court to make." *Id.* at 559. The analogous provision for administrative proceedings specifies that the EAJA determination is for the "adjudicative officer" to make. The question is whether an agency reviewing an adjudicative officer's fee determination, like a court of appeals reviewing a district court's fee determination, must apply an abuse-of-discretion rather than a *de novo* standard.

1. Lion Uniform is a small business engaged in the manufacture of industrial clothing. During the 1970s, the company owned a plant in Lake City, Tennessee, where it produced "fire coats" for firefighters. In October 1977, after an organizing campaign, the Oil, Chemical & Atomic Workers International Union, AFL-CIO, was certified as the collective bargaining agent for Lion Uniform's Lake City employees. App. 2a; 259 N.L.R.B. 1141, 1142.

One week later, the employees struck. The walkout seriously curtailed production at the Lake City plant. In order to meet customer commitments, Lion Uniform temporarily transferred its fire coat production to a vacant plant in Beattyville, Kentucky. A few months later, the company decided to make the relocation permanent. The larger Beattyville plant had proven more efficient than the Lake City facility and permitted greater expansion. App. 2a, 33a; 259 N.L.R.B. at 1146.

The Union challenged the relocation. It filed an unfair labor practice charge with the National Labor Relations Board, alleging that the transfer violated several provisions of the National Labor Relations Act. Although a relocation for business purposes is unobjectionable under the Act, the Union charged that Lion Uniform actually took that step because of its employees' union membership and activities. App. 2a, 22a.

In response to the charge, the Board's General Counsel placed two telephone calls to Lion Uniform. On both occasions, the company explained the business purposes underlying the production transfer. App. 85a-87a. The General Counsel made no further investigation—he neither subpoenaed any company documents nor sought to speak in person with any Lion Uniform official. App. 22a, 86a. Nevertheless, in February 1978, the General Counsel filed an administrative complaint against Lion Uniform alleging that the relocation was unlawfully motivated. App. 2a, 23a.

Throughout early 1978, as the strike continued, Lion Uniform offered to settle the complaint. The company proposed to reinstate the strikers at the Lake City plant under working conditions similar to those they enjoyed before the strike. The only difference was that the plant would produce seasonal knit garments instead of fire coats. The General Counsel rejected all offers. He was willing to dismiss the complaint only if Lion Uniform agreed to return fire coat production to Lake City. App. 23a, 79a.

2. In June 1978, after a hearing, an administrative law judge dismissed the complaint and directed the General Counsel to accept Lion Uniform's proposal to reinstate strikers under similar working conditions. 247 N.L.R.B. 994. The Union then agreed to end the strike, and the controversy appeared over.

But the General Counsel appealed the ALJ's decision to the Board. The Board reversed. 247 N.L.R.B. 992. It concluded that production of seasonal knit garments was not "substantially equivalent" to production of fire coats; it remanded for a "hearing on the merits of the complaint's allegations." *Id.* at 994.

In June 1980, Lion Uniform renewed its settlement efforts. By that time, the company had sold its plant in Lake City, a move that the General Counsel did not contest. The sale did not change the General Counsel's set-

tlement position. He was willing to dismiss the complaint only if Lion Uniform recommenced fire coat production in Lake City—even though that would mean purchasing a new plant. App. 52a-53a, 80a; 259 N.L.R.B. at 1142.

In an effort to end the litigation, Lion Uniform acceded to the General Counsel's demands, with one minor condition. The company would open a new facility in Lake City for the production of fire coats so long as at least 15 of the former strikers—most of whom were by then working for Lion Uniform's successor—agreed to staff the facility. Lion Uniform explained that it would suffer extreme financial hardship if compelled to operate the facility with fewer employees. Without ever investigating this financial hardship claim, the General Counsel rejected the offer. App. 52a-54a, 80a-84a.

The hearing on the merits was held in September 1980 before a second ALJ. The General Counsel presented four witnesses, none of whom testified as to the motive of the relocation. Lion Uniform then introduced evidence of the business purposes animating its decisions.

The ALJ ruled that the complaint was groundless. In his words, "[t]he record provided *no basis* on which I could find Respondent violated Section 8(a)(3) or (5)." 259 N.L.R.B. at 1145 (emphasis added). The "[u]nrebutted evidence" showed that the relocation "was necessitated by business reasons." *Id.*

The General Counsel again appealed. In a four-paragraph decision, the Board affirmed all "rulings, findings, and conclusions of the Administrative Law Judge." *Id.* at 1141 (footnotes omitted).

3. In February 1983, Lion Uniform filed an application for attorney's fees under the EAJA. The Board referred the application to the "adjudicative officer" who had heard the merits dispute.

The ALJ found that the General Counsel's position throughout the proceeding was not "substantially justified." The issuance of the complaint, he found, was unreasonable because it was based on a shoddy investigation: the "facts were never in dispute" and were always "available to the [General Counsel]." App. 72a. The General Counsel's refusal to settle was likewise improper because "the material complaint allegations had no basis in fact or law." App. 78a-79a. The ALJ particularly faulted the General Counsel for rejecting the company's offer to reestablish fire coat production in Lake City with a minimum of 15 former employees. The General Counsel "acted unreasonably in refusing to pursue investigation of [Lion Uniform's] several claims of financial hardship regarding return of the firemen's clothing." App. 84a.

On the basis of these findings, the ALJ awarded attorney's fees and expenses incurred by Lion Uniform in connection with the proceedings.

4. The General Counsel appealed to the Board. For nearly four years, the Board did nothing. Finally, in August 1987, it reversed the ALJ over the dissent of Chairman Dotson.

The Board conducted a *de novo* review; it gave no deference to the adjudicative officer's findings. Based on its own reading of the record four years after the ALJ's award, the Board simply "disagree[d]" with the ALJ and found that "the General Counsel was substantially justified in initiating and pursuing the unfair labor practice proceeding." App. 19a-20a.

In his dissenting opinion, Chairman Dotson stated that "the General Counsel acted unreasonably, without substantial justification," not only in bringing the complaint against Lion Uniform, but also in ignoring "repeated opportunities . . . to avoid the consequences of this unreasonable and costly course of action, by agreeing to any one of [Lion Uniform's] several settlement offers." App.

57a-58a. In his view, "the decision . . . in this case does nothing to advance, and much to undermine, the purpose and governing principle of the [EAJA]." App. 60a.

5. Pursuant to 5 U.S.C. § 504(c)(2), Lion Uniform appealed the Board's EAJA decision to the United States Court of Appeals for the Sixth Circuit.[2] The company made two contentions. First, it argued that, because the Act expressly assigns to the "adjudicative officer" the determination whether the agency's position in the underlying litigation was "substantially justified," the agency's review of that determination must be deferential, not *de novo*. The company relied on *Pierce v. Underwood*, 487 U.S. 552 (1988), in which this Court held, under the analogous EAJA provision governing court actions, that a district court's "substantial justification" findings are reviewable only under an "abuse-of-discretion" rather than a *de novo* standard. Second, Lion Uniform contended that, under any standard of review, the General Counsel's prosecution of the case was not "substantially justified."

The court of appeals affirmed the Board on both counts. It held that *de novo* review was appropriate at the agency level because, under the Administrative Procedure Act, the Board's "normal function" is "to examine the complete record of a proceeding and make *de novo* findings of fact." App. 7a. Divergence from this usual course, according to the court, would require "more specific legislative direction." App. 8a-9a. The court sought to distinguish *Pierce v. Underwood* on the ground that it concerned only "[t]he relationship between a court of appeals and a district court"—a relationship that "differs

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[2] Under that provision, an applicant may appeal an agency's denial of fees and expenses "to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication." 5 U.S.C. § 504(c)(2).

substantially from the one existing between an A.L.J. and the Board." App. 7a.

Reaching the merits of the case, the court held that "substantial evidence supported the Board's decision that the General Counsel was substantially justified" in filing the complaint and in rejecting Lion Uniform's settlement offers. App. 10a.

This petition presents only the standard-of-review question.

REASONS FOR GRANTING THE WRIT

Congress chose deliberately to entrust the "'adjudicative officer," not the "agency," with responsibility for making EAJA fee determinations. It preferred to rely on presumptively independent adjudicative officers because it believed that agencies would be institutionally reluctant to admit that a case should never have been brought. By ruling that an agency may nonetheless reverse a fee award based on its own *de novo* findings, with no deference at all to the adjudicative officer's findings, the court of appeals has effectively negated the congressional choice. As in *Pierce v. Underwood*, an adjudicative officer's fee award, like a district court's fee award, is properly reviewable only for abuse of discretion.

The standard of agency review is a substantial issue of recurring importance. It affects every federal agency that conducts adversary adjudications. It likewise touches the many thousands of individuals and small businesses whose equal access to administrative justice is jeopardized by the court of appeals' decision. The issue warrants this Court's plenary review.

1. The text and structure of the statute are incompatible with *de novo* agency review. Congress provided that a non-governmental party that prevails in any agency adjudication is entitled to an award of fees and expenses, "unless the *adjudicative officer* of the agency finds that

the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1) (emphasis added). Permitting an agency to make *de novo* findings would nullify the statutory language. The result would be no different than if Congress had assigned the fact-finding function to the "agency" instead of the "adjudicative officer."

Congress specifically rejected that alternative. As originally passed by the Senate, the bill provided for an award of fees "unless *the agency* finds that the position of the agency as a party to the proceedings was substantially justified." S. 265, 96th Cong., 1st Sess. § 3(a) (1979) (emphasis added). When the House of Representatives considered the bill, it substituted "adjudicative officer" for "agency." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 2 (1980).

Congressman Railsback, ranking minority member of the relevant House subcommittee, explained that an agency should not be asked "to pass judgment on whether its own action has been proper." *Award of Attorneys' Fees Against the Federal Government: Hearings on S. 265 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 33 (1980). In his view, because an agency is unlikely "to admit that it made an error in the first place," the preferable approach is to assign responsibility for making the statutory determinations to an "administrative officer or judge," who is "presumptively independent" and therefore a better candidate for impartial decision-making. *Id.* at 62, 95

2. As in *Pierce v. Underwood*, Congress's choice of language implies a deferential standard of review. At issue in *Underwood* was a parallel provision governing litigation in court. It provides, in terms nearly identical to section 504, that a prevailing private party is entitled to an award of fees and expenses, "unless the *court* finds

that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (emphasis added). This Court reasoned that "[t]his formulation, as opposed to simply 'unless the position of the United States was substantially justified,' emphasizes the fact that the determination is for the district court to make, and thus suggests some deference to the district court upon appeal." 487 U.S. at 559. The same formulation in section 504, reinforced by the change from "agency" to "adjudicative officer," gives rise to a similar inference here.

Other considerations on which the Court relied in *Underwood* "argue[] in favor of deferential, abuse-of-discretion review" (*id.* at 560) in this case as well. An adjudicative officer, no less than a district judge, "may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government." *Id.* For similar reasons, and in reliance on *Pierce v. Underwood*, this Court held last Term that a court of appeals must apply an abuse-of-discretion standard in reviewing a district court's award of monetary sanctions under the analogous provisions of Rule 11 of the Federal Rules of Civil Procedure. *Cooter & Gell v. Hartmarx Corp.*, No. 89-275 (June 11, 1990).

Likewise, a deferential standard of review in administrative proceedings, just as in judicial proceedings, will further the Court's "view that a 'request for attorney's fees should not result in a second major litigation.'" *Pierce v. Underwood*, 487 U.S. at 563, *quoting Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). This case is a glaring example of such a "second major litigation": seven years of administrative and judicial litigation and thousands of dollars in additional legal expenses could have been avoided if the Board had afforded the adjudicative officer's EAJA determination the deference it deserved.

3. The court of appeals believed that deference to the adjudicative officer is unnecessary because, "[u]nlike an appellate court, the Board's normal function requires it to examine the complete record of a proceeding and make *de novo* findings of fact." App. 7a. But Congress in the EAJA consciously departed from the norm.

The seminal decision establishing that an agency may conduct *de novo* review of an ALJ's findings is *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The Court rested its holding in that case on the terms of the governing statute, which provided that "the *Board* shall state its findings of fact." 29 U.S.C. § 160(c) (emphasis added). The Court stated:

> The responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are "clearly erroneous." Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required.

340 U.S. at 492.

Here the situation is reversed. Having determined that an agency should not judge the propriety of its own actions, Congress followed this Court's prescription in *Universal Camera* and assigned the EAJA fact-finding function expressly to the adjudicative officer rather than to the Board. The "explicitness" required by *Universal Camera* has been met. To demand, as the court of appeals has, even "more specific legislative direction" (App. 8a-9a) is to force Congress to jump through hoops. It has spoken clearly enough. Its purpose should be honored.

4. The court of appeals thought that an abuse-of-discretion standard would create "a convoluted scheme for reviewing fee determinations." App. 8a. "[We] would be directing our attention to whether substantial evidence supports the Board's decision that the A.L.J.

abused his discretion in determining that the government's position was substantially justified." *Id.*

The problem is illusory. If an agency overturns a fee award on the ground that the adjudicative officer abused his discretion, the reviewing court has only a single inquiry: does substantial evidence support the final agency decision denying fees? If so, that is the end of the matter. In a rare case, a party might contend that an agency so "misapprehended or grossly misapplied" the abuse-of-discretion standard that its decision is tantamount to a *de novo* review. *Cf. Universal Camera*, 340 U.S. at 491. But the presence of such an issue does not make the court's review "convoluted." On the contrary, it operates, as Congress intended, to keep the agency out of the fact-finding business in EAJA disputes.

The court of appeals took the view that "a highly deferential review by the Board, followed by a less deferential review by the courts, makes little sense," and that "*de novo* review at the agency level" followed by "substantial evidence review before the courts" is a "more logical scheme." App. 8a-9a. Maybe so. Surely in other settings it is the typical pattern. But that choice is for Congress, not the courts.

Congress preferred a system in which the adjudicative officer determines whether the agency's litigating position was substantially justified. Giving the agency *de novo* authority to make the same determination defeats the legislative choice by reassigning the EAJA fact-finding function to the agency itself. Whatever the court of appeals may think about the wisdom or logic of the congressional judgment, it is not free to rewrite the statute to suit its own preferences.

5. The Administrative Conference of the United States in adopting model rules under the EAJA, took the position that agencies have authority to make *de novo*

findings on the issue of substantial justification. Like the court of appeals, the Administrative Conference stated that, "[i]f Congress meant to depart so substantially from customary agency practice in adjudications under the Administrative Procedure Act, we believe it would have done so explicitly." 46 Fed. Reg. 32,900, 32,910 (1981).

But that was not the Administrative Conference's initial view of the statute. Before it received the objections of the NLRB and several other agencies, it proposed a rule under which "an adjudicative officer's determination on the justification of the agency's position . . . will be reversible only for abuse of discretion." Proposed Model Rules § 0.409(b), 46 Fed. Reg. 15,895, 15,905 (1981). The Administrative Conference explained that "[t]he Act explicitly assigns determination of [substantial justification] . . . to the adjudicative officer rather than the agency." *Id.* at 15,901. Abuse-of-discretion review was "intended to achieve the Congressional intent in a way that takes into account the ususal [*sic*] decision-making process of agencies." *Id.*

The Administrative Conference's proposed rule was truer to the statute than was its revised rule. It has not revisited the standard-of-review issue since 1981. Were it to do so in light of *Pierce v. Underwood*, it might reach the same conclusion that we do.

6. In 1985, Congress amended the EAJA in several respects. Among the changes was the addition of a new sentence to section 504(a)(3) providing that "[t]he decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section." Before that provision was added, the statute had left "open the question of whether the agency is free to review the adjudicative officer's decision on a fee application." Robertson & Fowler, *Recovering Attorneys' Fees From the Government Under the Equal Access to Justice Act*, 56 Tul. L. Rev. 903, 922-23 (1982).

The Administrative Conference and the Department of Justice took conflicting views. The Administrative Conference concluded that an agency could review the adjudicative officer's decision and issue an administratively final decision. 46 Fed. Reg. 15,895, 15,901 (1981). The Department of Justice disagreed. It concluded that "the terms of the Act in light of Congress' purpose . . . preclude review at the administrative level of the findings of the adjudicative officer"; "whether the position of the agency was 'substantially justified' or whether 'special circumstances make an award unjust' are not findings subject to revision by the agency." 47 Fed. Reg. 15,774, 15,776 (1982).

In the 1985 amendment, Congress "allow[ed] the agency rather than the adjudicative officer to make the final decision on fee award at the agency level," thereby "follow[ing] the view adopted by the Administrative Conference." H.R. Rep. No. 120, 99th Cong., 1st Sess. 7, 14 (1985).

Contrary to the NLRB's assertion in the court of appeals, nothing in the 1985 legislation affected the agency standard of review. Congress left wholly untouched the provision assigning the fact-finding function to the adjudicative officer. While endorsing the Administrative Conference's position that an agency may review the adjudicative officer's findings, Congress neither did nor said anything to suggest that an agency may exercise that authority by making *de novo* findings of its own.

7. The standard of review for EAJA determinations at the agency level is a pervasive issue, potentially affecting far more litigants than the related issue resolved by the Court in *Pierce v. Underwood*. Tens of thousands of adversary proceedings are conducted by federal agencies each year.

Whether the adjudicative officer or the agency itself makes the crucial findings under the Act can have enor-

mous practical significance. If, as Congress believed, an agency is less likely to rule that its own litigating position was not substantially justified, a *de novo* standard may induce government lawyers to become less vigilant concerning the merits of their position. It may also discourage individuals and small businesses with limited resources from pursuing even legitimate claims, because they would perceive their prospects of recovery under the EAJA as too remote.

That would subvert the central objectives of the Act. Congress was concerned that "the ability of most citizens to contest any unreasonable exercise of authority has decreased" and that "the Government with its greater resources and expertise can in effect coerce compliance with its position." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980). It believed that "[t]his kind of truncated justice undermines the integrity of the decision-making process." *Id.* Applying an incorrect standard of review can erode the Act's policy as effectively as applying an erroneous substantive standard.

Because this is the first case to address the issue, this Court might ordinarily be inclined to await a conflict in the circuits. But there is no assurance that this issue will reach the Court again. Though the standard of review is of substantial day-to-day importance to nearly every federal agency and to thousands of individuals and small businesses, the stakes in any particular case are likely to be small. It is a rare situation in which a litigant with limited resources would be willing to risk the large expense of pursuing an EAJA claim through two levels of agency review and two or possibly three levels of court review in the hope of creating a conflict among the circuits.

This case squarely presents the issue. We urge the Court to decide it now.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-6001

LION UNIFORM, INC., JANESVILLE APPAREL DIVISION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review of an Order of the
National Labor Relations Board

Decided and Filed June 5, 1990

Before: KEITH, MILBURN and NORRIS, Circuit Judges.

ALAN E. NORRIS, Circuit Judge. Petitioner, Lion Uniform, Inc., Janesville Apparel Division, seeks attorney's fees from respondent, National Labor Relations Board, under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, for legal expenses incurred in an underlying unfair labor practice case. This appeal presents the question of the appropriate standard of agency review to be accorded an Administrative Law Judge's decision on such an application for fees. Because we conclude that the Board appropriately applied a *de novo* standard of re-

view and that substantial evidence supports the Board's determination, we affirm the denial of fees.

I.

During the 1970s, Lion Uniform manufactured "fire coats" for firefighters at its Lake City, Tennessee plant. In May 1977, the Oil, Chemical & Atomic Workers International Union, AFL-CIO ("the Union") began to organize employees at the Lake City plant; ultimately, they voted to join the Union.

Prior to the July election, Lion Uniform interrogated employees about union activities and threatened to refuse to negotiate with the Union, to discharge employees, and to close the plant. Immediately following the election, the company unilaterally imposed changes in working conditions. The Board ultimately found that this conduct violated provisions of the National Labor Relations Act.

In October, employees struck the Lake City plant to protest the changes in working conditions. During the strike, Lion Uniform moved the fire coat production line to a larger facility it had previously purchased in Beattyville, Kentucky. On October 23, the company sent a telegram to the Union indicating the relocation was temporary and was due to the work stoppage. However, a telegram sent the next day said the transfer was occurring because of an increase in business and the lack of room to expand in Lake City.

In November, the Union filed a complaint with the Board alleging that the relocation was an unfair labor practice. Following investigation of the complaint, the General Counsel of the Board, in February 1978, filed a complaint against Lion Uniform charging that the relocation of the fire coat production line violated 29 U.S.C. § 158(a)(3). It is the General Counsel's filing and subsequent handling of this unfair labor practice complaint

that is the focus of the company's application for attorney's fees under the EAJA.

Settlement Offers and Disposition on the Merits

In March 1978, Lion Uniform offered to settle the charges brought by the General Counsel by admitting the allegations of the complaint and rehiring all of the striking employees if the remedy chosen by the Board would allow the company to reopen the Lake City plant to make knit shirts rather than fire coats. Both the Union and the General Counsel opposed the proposal, demanding that the fire coat line be returned to Lake City. Following a hearing, an A.L.J. concluded that the work of making knit shirts would be substantially equivalent to making fire coats and the offer should be accepted.

The Board overturned the A.L.J.'s decision to accept the settlement, ruling that the knit shirt work was not substantially equivalent, and remanded the case for a hearing on the merits of the complaint.

Lion Uniform proposed a different settlement in June 1980, but the General Counsel refused to accept it. In August, the company offered to pay moving expenses of any employee who wished to work at the Beattyville facility, but the General Counsel also refused this offer.

At the hearing before the A.L.J. on the merits, the company introduced evidence that the Beattyville facility had been purchased pursuant to a management plan initiated several years earlier. That plan called for Lion Uniform to move the fire coat line to the larger Beattyville facility at some point in the future. The company also introduced evidence that it had fallen behind in its production schedule to the point that customers were complaining about delays in receiving their orders, and that, as time passed, it became much more economically efficient to leave the fire coat line in Beattyville.

In February 1981, the A.L.J. issued his decision finding that, although Lion Uniform had committed numerous violations of the NLRA, it had not committed an unfair labor practice when it moved the fire coat line.

Application for Fees under the EAJA

Having prevailed on the merits, Lion Uniform sought attorney's fees under the EAJA. The A.L.J. responded by concluding that the General Counsel's position was not "substantially justified" at any stage of the litigation. He found that the General Counsel's office was not justified in filing the complaint because it had no evidence that the relocation was caused by anything other than the economic problems brought on by the strike, and that the General Counsel acted unreasonably in rejecting the settlement offers.

The Board reversed the A.L.J.'s award of attorney's fees. Applying a *de novo* standard of review, it concluded that the General Counsel was substantially justified at each stage of the administrative proceedings.

Lion Uniform now asks this court to overturn the Board's decision, contending that the Board applied the improper standard of review in overturning the A.L.J.'s award, and that the Board erred in concluding that the positions taken by the General Counsel were substantially justified.

II.

The Equal Access to Justice Act permits parties prevailing over the United States to recover attorney's fees and related expenses if the government's position was not substantially justified. The Act contains provisions authorizing fee awards in specified civil judicial actions, 28 U.S.C. § 2412, and in adversary administrative proceedings, 5 U.S.C. § 504.

5 U.S.C. § 504(a)(1) provides that

> [a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

While the decision on an application for fees is initially made by the adjudicative officer, the final administrative decision is that of the agency. 5 U.S.C. § 504(a)(3). A nongovernmental party dissatisfied with the agency's decision may appeal to the federal court having jurisdiction to review the merits of the underlying dispute. That court may modify the agency's determination only if the agency's failure to award fees was unsupported by substantial evidence. 5 U.S.C. § 504(c)(2).

But, while the EAJA sets out the substantial evidence standard of review for courts reviewing final agency decisions, the Act is silent on the appropriate standard of review to be accorded an A.L.J.'s decision in the course of an internal agency review. According to Lion Uniform, the Board erred in conducting a *de novo* review of the A.L.J.'s determination that the General Counsel's position in the underlying proceeding on the merits was not substantially justified. The proper standard of review, says the company, is whether the A.L.J.'s decision to award fees amounted to an abuse of discretion.

In support of its position, Lion Uniform relies upon the opinion of the United States Supreme Coprt in *Pierce v. Underwood*, 108 S. Ct. 2541 (1988). In *Pierce*, the Court was called upon to determine the correct standard of review to be applied by a court of appeals when reviewing a district court's determination that a federal agency's position was not substantially justified. Upon considering the provision of the EAJA authorizing fee

awards in civil judicial proceedings, 28 U.S.C. § 2412(d)(1)(A), the Court noted that, for purposes of standards of review, "decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." 108 S. Ct. at 2546. It concluded that a deferential abuse of discretion, rather than a *de novo* standard, is to be applied when a court of appeals reviews a district court's determination that the government's position was not substantially justified.

The Supreme Court first noted that the statute provides that "attorney's fees shall be awarded 'unless *the court finds* that the position of the United States was substantially justified,' . . . as opposed to simply 'unless the position of the United States was substantially justified,'" and that such a formulation "emphasizes the fact that the determination is for the district court to make, and thus suggests some deference to the district court upon appeal." *Id.* at 2547 (citation omitted). The Court also was of the opinion that a district court is in a superior position to determine if the government's position is substantially justified because it "may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government." *Id.*

Lion Uniform recognizes that *Pierce* does not directly apply to this case, as the Supreme Court there concerned itself with application of the provision of the EAJA dealing with fee awards to prevailing parties in civil actions, as opposed to those who prevail in adversary administrative adjudications. It argues, however, that the reasoning of *Pierce* applies, since the language in the civil actions statute parallels the language in the administrative provision, that fees must be awarded "unless *the adjudicative officer of the agency finds* that the position of the

agency was substantially justified." 5 U.S.C. § 504(a)(1) (emphasis added).

The Board urges us to adopt the position of the Administrative Conference of the United States. After the EAJA was originally enacted, the Administrative Conference drafted a set of model rules to assist agencies in formulating their own rules for implementation of the Act. The Conference initially proposed an abuse of discretion standard of review, *see* Notice, Implementation of the EAJA, 46 Fed. Reg. 15,895, 15,900-01 (Mar. 10, 1981), but, after comment from several agencies, revised its model rule stating:

> [W]e agree with those agencies that believe the standard of review in 5 U.S.C. 557 [*de novo* review] applies to decisions on applications for attorney fees, and the final model rule (§ 0.308) does not include a special standard of review. . . . [W]e believe Congress mentioned the adjudicative officer in order to ensure that the initial ruling on an application would be made by someone with direct knowledge of the underlying proceeding. If Congress meant to depart so substantially from customary agency practice in adjudications under the Administrative Procedure Act, we believe it would have done so explicitly.

Notice, EAJA: Agency Implementation, 46 Fed. Reg. 32,900, 32,910 (June 25, 1981) (regulation codified at 1 C.F.R. § 315.308 (1989)).

The Board has the better side of the argument. The relationship between a court of appeals and a district court differs substantially from the one existing between an A.L.J. and the Board. Unlike an appellate court, the Board's normal function requires it to examine the complete record of a proceeding and make *de novo* findings of fact. *See* Administrative Procedures Act, 5 U.S.C.

§ 557 (providing for *de novo* review of agency adjudications).

In addition, judicial review of the agency's final decision on fees is more easily reconciled with a *de novo* review by the agency of the A.L.J.'s determination, since courts apply a substantial evidence standard of review in appeals from an agency's final decision. Because the decision the court reviews is the product of a *de novo* review, it makes sense to look to that decision as the basis of deciding whether the agency's determination that its position was substantially justified is supported by substantial evidence.

Were an agency permitted to overturn an A.L.J.'s determination only if it found that the A.L.J. abused his discretion, it is not clear how a court could sensibly apply its statutory standard of review. For example, in this appeal, if we were to apply our standard of review to the A.L.J.'s finding, in order to determine whether the A.L.J.'s decision to award fees was supported by substantial evidence, then the Board's abuse of discretion review would be more deferential than this court's substantial evidence inquiry. On the other hand, were we to apply the standard of review to the final decision of the Board, we would be directing our attention to whether substantial evidence supports the Board's decision that the A.L.J. abused his discretion in determining that the government's position was substantially justified. It is unlikely that Congress intended such a convoluted scheme for reviewing fee determinations.

The rationale of the opinion in *Pierce* is, of course, sound in the context of the relationship between a court of appeals and a district court, where the EAJA litigation begins in the district court. But, where the EAJA litigation begins before an agency, with appeals contemplated to the courts, a highly deferential review by the Board, followed by a less deferential review by the courts, makes little sense. In the absence of more specific legis-

lative direction, we must assume that the more logical scheme applies—that the standard of deference is heightened as the appeal process progresses—*de novo* review at the agency level, and substantial evidence review before the courts.

III.

In *Pierce*, the Supreme Court pointed out that the "substantially justified" standard is essentially one of reasonableness. 108 S. Ct. at 2549-51. The government's litigating position will be "substantially justified" if it has a "reasonable basis both in law and fact" or is "justified to a degree that could satisfy a reasonable person." *Id.* at 2550.

The Board found that the General Counsel was substantially justified in filing the complaint given the information he had at the time. According to the company, however, the filing was not substantially justified since, had the General Counsel's office adequately investigated the Union's complaint, it would have learned that the relocation was motivated solely by business reasons. Lion Uniform particularly faults the General Counsel for failing to interview company officials and review financial records, citing a number of cases for the proposition that the General Counsel has a duty to investigate before filing a complaint. *See, e.g., Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143, 1147-48 (D.C. Cir. 1988).

In *Leeward Auto Wreckers*, the court of appeals recognized that, while the General Counsel has a duty to investigate, the filing of a complaint and proceeding to a hearing in that case was substantially justified since the General Counsel requested a response from the company to the union's charges and the company failed to put forward any proof to back up its oral representations. *Id.* at 1148.

Here, Lion Uniform failed to provide the General Counsel with any written evidence concerning the company's

ultimately successful defenses until the hearing on the merits. The company made pre-election threats to close the Lake City plant and, two weeks after employees went on strike, sent a telegram to the Union indicating that the production line was being relocated because of the work stoppage. It then sent a second telegram saying the relocation was due to the increase in business, coupled with the lack of room to expand in Lake City. When the Union filed an unfair labor practice charge and an investigator from the General Counsel's office asked the company to explain its relocation decision, it directed the investigator to its previous telegrams and assured him that the transfer was only temporary. Shortly thereafter, it notified the Union the move was to be made permanent.

Even when it decided to make the relocation permanent, the company failed to provide the General Counsel with evidence of the plan developed several years earlier to permanently transfer its production to Beattyville. A month later, in February 1978, the General Counsel's complaint was filed. Not until the hearing on the merits in the fall of 1980 did Lion Uniform produce written evidence of its business reasons for the relocation of production. In view of all these circumstances, the General Counsel certainly had a reasonable basis in fact to believe that the relocation was improperly motivated. Accordingly, substantial evidence supported the Board's decision that the General Counsel was substantially justified in filing the complaint.

Lion Uniform also contends that the General Counsel was not substantially justified in refusing its settlement offers. Because all three offers were made before the company presented its evidence of business reasons for relocating the plant, the General Counsel was warranted in believing the case against the company was stronger than was actually the fact. This amounts to substantial evi-

dence to support the Board's decision that the General Counsel was substantially justified in refusing these offers.

IV.

For the foregoing reasons, the Board's order denying attorney's fees and other expenses under 5 U.S.C. § 504 is **affirmed.**

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 10—CA—12938(E)
10—CA—13089(E)
10—CA—13284—2(E)

LION UNIFORM, JANESVILLE APPAREL DIVISION

and

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On 13 September 1983 Administrative Law Judge J. Pargen Robertson issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Applicant filed cross-exceptions, a supporting brief, and a brief in response to the General Counsel's exceptions. The General Counsel filed a brief in opposition to the cross-exceptions. The Applicant further filed a motion to dismiss the General Counsel's exceptions for lack of jurisdiction, and the General Counsel filed a memorandum in opposition to the Applicant's motion to dismiss.[1] Thereafter, the General Counsel filed a supplemental brief and a request for leave to file that brief in opposition to the Applicant's motion, and the Applicant filed a brief in

[1] The Applicant also requested oral argument. This request is hereby denied as the record, the exceptions, the cross-exceptions, and the briefs adequately present the issues and the positions of the parties.

opposition therto.[2] The Applicant also filed a motion for issuance of decision.

The Board has considered the decision and the record in light of the exceptions, motions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

On 21 January 1982 the Board issued a Decision and Order in the underlying unfair labor practice case.[3] Thereafter, the Applicant applied for an award of attorney's fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1982).[4] In the attached decision, the judge found that the Applicant is an eligible party and that the position of the General Counsel in the underlying case was not "substantially justified" within the meaning of EAJA. Accordingly, he recommended that the Applicant be reimbursed for certain specified fees and expenses incurred in the underlying unfair labor practice proceeding and in the instant EAJA proceeding. The General Counsel has excepted; the Applicant has cross-excepted; and, as noted, has also filed a motion to dismiss the General Counsel's exceptions for lack of jurisdiction.

Initially, we must rule on the Applicant's motion to dismiss the General Counsel's exceptions for lack of jurisdiction. The Applicant contends that the Board does not have jurisdiction to review the judge's EAJA decision. This contention is premised on the original language of

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[2] The General Counsel's request is denied as the positions of the parties had been presented adequately prior to the filing of the request, i.e., in the Applicant's motion to dismiss, the General Counsel's exceptions and the General Counsel's memorandum in opposition to the Applicant's motion.

[3] *Lion Uniform*, 259 NLRB 1141.

[4] Subsequently, EAJA was amended. See Pub. L. 99—80, 99 Stat. 183—187 (1985).

EAJA, which subsequently was amended.[5] The amendments to EAJA, which apply to "cases pending on . . . the date of the enactment of this Act,"[6] include the addition of the following language to Section 504(a)(3): "The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section." The report of the House of Representatives' Committee on the Judiciary that accompanied the bill which subsequently was enacted as the amendments to EAJA states, regarding this language, "This provision explicitly adopts the view that the agency makes the final decision in the award of fees in administrative proceedings under section 504. This . . . recognizes the fact that decisions in administrative proceedings are generally not final until they have been adopted by the agency."[7] Accordingly, we find that the Board has jurisdiction to review the judge's EAJA decision, and we deny the Applicant's motion to dismiss. We now consider the judge's award of fees to the Applicant.

The first issue to consider are the Applicant's eligibility for reimbursement and the date for determining that eligibility. The original language of EAJA defined a "party" eligible for reimbursement of legal fees and expenses as "[a] corporation . . . but exclude[d] (i) any . . . corporation . . . whose net worth exceeded $5,000,000

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[5] See the original versions of 5 U.S.C. § 504(a)(1) (applications "shall" be granted "unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust"); § 504(c)(2) ("[a] party dissatisfied with the fee determination . . . may petition for leave to appeal to the court . . . having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication"); and § 504(b)(1)(B) which, in defining "party," does not include any agency of the United States.

[6] Pub. L. 99—80 § 7(a), 99 Stat. 183, 186 (1985).

[7] H.R. Rep. No. 99—120 at 14 (1985).

at the time the adversary adjudication was initiated . . . and (ii) any . . . corporation . . . having more than 500 employees at the time the adversary adjudication was initiated." [8] The judge concluded that EAJA may be read to *include* as eligible those corporations with *either* 500 or fewer employees, *or* a net worth of $5,000,000 or less. He also determined that the Applicant's eligibility should be judged as of 17 November 1977, the date on which the first complaint in the underlying unfair labor practice case was issued. We find merit in the General Counsel's exceptions to both of these points.

Contrary to the judge's conclusion, the plain language of Section 504(b)(1)(B) prior to the 1985 amendments clearly showed that a corporation must have had *both* a net worth of not more than $5,000,000 *and* not more than 500 employees to be eligible for an award from the Board under EAJA.[9] More important, however, is the 1985 amendment of the definition of an eligible party. As noted above, the 1985 amendments to EAJA apply to cases such as the instant case that were pending on the date of the enactment of those amendments. Section 504(b)(1)(B) was amended in pertinent part to define as an eligible party "(ii) any . . . corporation . . . the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated." [10] Thus, the currently ap-

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[8] 5 U.S.C. § 504(b)(1)(B) (1982).

[9] See also the original language of the Board's Rules and Regulations, Sec. 102.143(c)(5), which defined as eligible those corporations "with a net worth of not more than $5 million and not more than 500 employees."

[10] See also Sec. 102.143(c)(5) of the Board's Rules and Regulations, as amended. 51 Fed. Reg. 17732, 17733 (1986), which defines an eligible corporation as one "with a net worth of not more than $7 million and not more than 500 employees." Sec. 102.143(d),

plicable language of EAJA makes it clear that both the net worth requirement and the employee complement requirement must be met as of the relevant date if a corporation is to be found eligible for an award of attorney's fees and expenses. We next must determine the relevant date in this proceeding.

The judge concluded that the relevant date to consider eligibility was 17 November 1977, the date on which the first complaint in the underlying unfair labor practice proceeding was issued. As noted above, EAJA defines the relevant date for the determination of eligibility as "the time the adversary adjudication was initiated,[11] and the Board's Rules and Regulations state that eligibility shall be determined "as of the date of the complaint in an unfair labor practice proceeding . . . ."[12] Neither definition explicitly addresses the problem with which we are confronted in this case, where two complaints were issued on two different dates and the Applicant prevailed on the allegations contained in the second complaint but did not prevail on the allegations contained in the first complaint as it issued on 17 November 1977.[13] For the following reasons, we agree with the General Counsel and will find the Applicant eligible for an award under EAJA only if it met the requirements for eligibility on 9 February 1978, the date of the second complaint and the date on which the General Counsel *first* made allegations on which the Applicant prevailed.

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which was not revised, states, "[T]he net worth and number of employees of an applicant shall be determined as of the date of the complaint in an unfair labor practice proceeding . . . ."

[11] 5 U.S.C. § 504(b)(1)(B).

[12] Board's Rules and Regulations, Sec. 102.143(d).

[13] The complaint which issued on 17 November 1977 was later amended, in September 1980, to include certain 8(a)(5) allegations on which the Applicant did prevail.

A party may be eligible for an award of attorney's fees and expenses pursuant to EAJA if it prevails in the underlying adjudication [14] or in a significant and discrete substantive portion of that proceeding.[15] As described below, the Applicant herein did not prevail on the allegations made formally by the General Counsel in the complaint as it issued on 17 November 1977. That earlier complaint alleged, for the most part, that the Applicant unlawfully threatened its employees in various respects during a union organizing campaign at its Lake City, Tennessee plant. The second complaint primarily alleged that the Applicant unlawfully removed certain work from the Lake City plant in violation of Section 8(a)(3). Although, as the Applicant points out, the General Counsel relied heavily on the organizing campaign threats in the attempt to prove that the removal of the work was motivated by unlawful considerations, the basic elements of the alleged violations are significantly different from each other and the allegedly unlawful events were separated by a period of time—the 8(a)(1) allegations occurring 3-5 months before the removal of the work from the Lake City plant which was the subject of the 8(a)(3) allegation. Obviously, an adverse ruling on the work removal allegations of the second complaint would have had a much greater impact on the Applicant's business than the cease and desist order that ultimately issued on the first complaint's contentions. Under these circumstances, we find that the date of the second complaint, 9 February 1978, is the date on which the Applicant's eligibility should be determined because the allegations on which the Applicant prevailed were first alleged in that complaint and because those allegations formed a significant and discrete substantive portion of the underlying proceeding.[16]

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[14] 5 U.S.C. § 504(a)(1) and (2).

[15] Board's Rules and Regulations, Sec. 102.143(b).

[16] See Board's Rules and Regulations, Sec. 102.143(b).

The next considerations involve the Applicant's net worth and number of employees on the relevant date of 9 February 1978. The General Counsel admits that the Applicant had a net worth of less than $5,000,000 on the date.[17] At issue is whether the Applicant on that date employed 500 or fewer employees.[18] The parties appear to agree that the Applicant employed at least 436.6 employees for EAJA purposes on 9 February 1978. The General Counsel and the Applicant each excepted to certain findings of the judge that otherwise affected the employee count. For example, the Applicant contends that the judge erred in including certain "extra" or temporary employees who worked at its Jellico, Tennessee plant between the fall of 1977 and the summer of 1978, and that the judge erred in including certain employees at its Williamsburg, Kentucky plant who did not work during the week that included 9 February 1978. For the reasons stated by the judge, we agree with his inclusion of these employees. The inclusion of these individuals brings the employee count as of 9 February 1978 to 455.6. Accordingly, we next consider the General Counsel's contention that the judge erred in not counting 54 individuals who were on strike at the Applicant's Lake City, Tennessee plant from 12 October 1977 until 16 May 1978.

As found in the underlying unfair labor practice case, the Applicant transferred production of its product line of clothing from Lake City to Beattyville, Kentucky, on 24 October 1977 because of the strike at Lake City. The

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[17] As noted above, the net worth standard was raised to $7,000,000 when EAJA was amended in 1985.

[18] EAJA does not define the term "employees." However, it seems clear that the definition is far less restrictive than that found in the National Labor Relations Act, as amended, and in Board and court cases interpreting Sec. 2(3) of that Act. The Board's Rules and Regulations define "employees," for EAJA purposes, as "all persons who regularly perform services for remuneration for the applicant under the applicant's direction and control. Part-time employees shall be included on a proportional basis." Sec. 102.143(f).

judge concluded that the Lake City strikers should not be included in the employee count because they were not regularly performing services for the Applicant on the relevant date and because, in view of the transfer of the product line and the hiring of new employees at Beattyville, inclusion of the strikers, who would have been producing the Beattyville product line had they not struck, would not give an accurate picture of the Applicant's size for EAJA purposes.

We agree with the judge's exclusion of the 54 strikers from the employee count. The Applicant employed 74 individuals at the Beattyville plant on 9 February 1978 in classifications held by the Lake City strikers prior to the strike. Those individuals produced the same product produced in Lake City before the strike. Under these circumstances, inclusion of the strikers would cause the Applicant to appear to be a larger business than it is.[19]

Accordingly, we find that the Applicant had not more than 500 employees and not more than $7,000,000 in net worth on 9 February 1978, the date on which the General Counsel initiated proceedings on which the Applicant prevailed, and that therefore the Applicant is an eligible party within the meaning of EAJA.

Having found that the Applicant is a party eligible for an award of EAJA fees, we must next decide whether the General Counsel was substantially justified in initiating and pursuing the unfair labor practice proceeding. The Board's Rules and Regulations provide that an applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication if it prevailed in that proceeding or in a significant and discrete

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[19] We find it unnecessary to decide whether strikers will be excluded from the total number of an applicant's employees in all cases. Further arguments advanced by the General Counsel with regard to the inclusion of other individuals need not be addressed because they would not affect the result reached herein.

substantive portion of that proceeding unless the General Counsel proves that the position in the unfair labor practice case, over which the applicant has prevailed, was substantially justified.[20] Further, in order to defeat a claim for fees and expenses under EAJA, the General Counsel must meet that burden with respect to each readily identifiable stage of the proceeding.[21] For example, the General Counsel may be able to prove substantial justification for issuing a complaint but not in proceeding to a hearing or in filing exceptions to a judge's decision. In this case, the judge concluded that the General Counsel was not substantially justified in issuing the complaint on which the Applicant prevailed or in taking certain other actions during the underlying proceeding. In this connection, he found that there was "no evidence" showing that the October 1977 relocation of the Applicant's product line was unlawfully motivated and that the General Counsel had offered no evidence showing that the Applicant violated Section 8(a)(5) of the Act by its October 1977 relocation. For the following reasons, we disagree with these conclusions and find that the General

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[20] Board's Rules and Regulations, Secs. 102.143(b), 102.144(a). The judge's decision in this case issued 13 September 1983, prior to the 1985 amendments to EAJA. Subsequent to those amendments, effective 15 May 1986, the Board revised Sec. 102.144(a) of its Rules and Regulations regarding substantial justification. That section now states (51 Fed. Reg. 17732 (1986)):

> An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication or in connection with a significant and discrete substantive portion of that proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that the General Counsel's position in the proceeding was substantially justified.

[21] See *Tyler Business Services v. NLRB*, 695 F.2d 73 (4th Cir. 1982).

Counsel was substantially justified in pursuing this case throughout the unfair labor practice proceeding.

Briefly stated, the facts of the underlying unfair labor practice case, which are described in greater detail in two earlier Board decisions,[22] are as follows: The Union began an organizing campaign at the Applicant's Lake City, Tennessee plant in the spring of 1977. In its decision at 259 NLRB 1141, the Board affirmed the judge's conclusion that during the campaign, the Applicant violated Section 8(a)(1) of the Act by, inter alia, interrogating its employees concerning their union activities, threatening that it would not negotiate with the Union, threatening to discharge employees if they joined or engaged in activities on behalf of the Union, threatening to close the plant if employees selected the Union as their collective-bargaining representative, and threatening to cancel its plans to expand and improve the Lake City plant because of the employees' union activities. These violations were found to have been committed by the Applicant's owner, and by high level and low level supervisors, and, indeed, were admitted by the Applicant. Despite these unfair labor practices, the Union won the Board-conducted election held 14 July 1977. Over the Applicant's exceptions, the Board also found that in August 1977 the Applicant unlawfully made unilateral changes in work rules. The Board further found that when the Union commenced a strike on 12 October 1977, the plant manager unlawfully told an employee that the striking employees were fired.

Thereafter, on 24 October 1977 while the strike was still in progress, the Applicant moved the Lake City plant's only product line, firemen's clothing, referred to as fire coats, to its Beattyville, Kentucky location. By

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[22] See 259 NLRB 1141 (1982), noted above; see also *Lion Uniform*, 247 NLRB 992 (1980). None of the present Board members participated in either decision.

telegram dated 23 October, the Applicant informed the Union that the removal of the product line was temporary and that it was caused by the strike. However, on 24 October the Applicant's attorney sent another telegram to the Union stating that the move was needed because there was insufficient room to expand at Lake City. Negotiations between the Applicant and the Union began the next day, during which the Applicant told the Union that the move was temporary. The Applicant also told the Union that the move was temporary during bargaining sessions on 1, 2, and 28 November 1977.

The complaint in Cases 10—CA—12938 and 10—CA—13089, which alleged the 8(a)(1) violations and the 8(a)(5) violation described above, was issued on 17 November 1977. During telephone conversations in December 1977, the Board agent, investigating yet another charge (Case 10—CA—13284—2), which alleged that the October 1977 move was in violation of Section 8(a)(3), asked the Applicant's attorney what its position was with respect to the charge allegation that removal of the fire coat line was unlawful. The attorney responded by asking the Board agent whether he had a copy of the Applicant's 23 October telegram to the Union, which stated that the move was temporary, and by stating that he did not know what else he could offer by way of proof other than the Applicant's repeated assurance to the Union that the move was temporary. Thereafter, the General Counsel requested no further evidence on this charge and the Applicant offered none.

On 5 January 1978 the Applicant informed the Union by letter that it had tentatively decided to make the transfer of fire coat production from Lake City to Beattyville permanent. The letter also stated that the Applicant was prepared to discuss the matter and that the Applicant intended to produce other products at Lake City when the

strike ended.[23] The complaint in Case 10—CA—13284—2 was issued on 9 February 1978, alleging, inter alia, that the October 1977 removal of the fire coat line violated Section 8(a)(3) and (1) of the Act. That allegation was consolidated for hearing with the earlier complaint's allegations, though the two complaints were not formally consolidated.

The Applicant made several settlement offers after the issuance of the second complaint. At the hearing held before Administrative Law Judge Michael O. Miller in May 1978, the Applicant offered to admit all allegations in the two complaints if the Board's order would permit it to reopen the Lake City facility with a different product line. The judge then limited the hearing to the issues of whether the new product line was substantially equivalent to the work previously performed at Lake City and whether the Applicant had sufficient justification for refusing to return the previous product line to Lake City. In his 8 June 1978 decision, the judge answered both questions affirmatively, approved the unilateral settlement agreement, and found, pursuant to the Applicant's admissions, that the Applicant had violated Section 8(a)(1), (3), and (5) of the Act. The Board reversed Judge Miller's decision on 11 February 1980,[24] finding that reinstatement of the fire coat product line would be an appropriate remedy if the unfair labor practices were found. The Board concluded that the new product line was not substantially equivalent to the work performed before the strike and that the record did not support the judge's finding that reinstatement of the old product line

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[23] The strike ended on 16 May 1978 and the Union made an unconditional offer to return on behalf of the strikers on that date. Between 31 May and 20 June 1978, the Applicant offered the employees employment on work other than fire coats. Some accepted and some rejected the offer.

[24] See 247 NLRB 992 (1980), noted above.

at Lake City would not be feasible.[25] Accordingly, the Board remanded the case for further hearing on the merits of the complaints' allegations.[26]

The Applicant continued to offer settlement proposals, which the General Counsel rejected, at least through the commencement of the September 1980 hearing before Judge Robertson.[27] In his 5 February 1981 decision, the judge found that the Applicant had not violated Section 8(a)(3) when it moved the fire coat line from Lake City and that it had not violated Section 8(a)(5) in any of its dealings concerning the move. However, as outlined above, the judge found several violations of Section 8(a)(1), most of which were admitted by the Applicant, and a violation of Section 8(a)(5) in its unilaterally changing terms and conditions of employment in August 1977. Exceptions to the judge's decision were filed by the General Counsel and the Charging Party, and the Applicant filed cross-exceptions. Thereafter, the Board adopted the judge's decision.[28]

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[25] 247 NLRB at 992, 994.

[26] Our dissenting colleague elaborates at great length on the Applicant's settlement offer, which Judge Miller accepted, and strongly intimates that the Board should likewise have accepted it. But the earlier Board did not do so, and the record does not show that the Applicant appealed the Board's order. It therefore stood as the law of this case and was an element that the General Counsel could consider in the later responses to various other settlement offers which the Applicant made.

[27] At the September 1980 hearing, the General Counsel also included two further unfair labor practice allegations, i.e., that the Applicant had violated Sec. 8(a)(5) by refusing to bargain about its October 1977 move and its alleged decision to remain in Beattyville in January 1978. These allegations were added to the first, not the second, complaint in this proceeding, though it was the second complaint which alleged that the move itself violated Sec. 8(a)(3) of the Act.

[28] 259 NLRB 1141 (1981).

With these facts as background, we will examine the General Counsel's exceptions to the judge's finding that the General Counsel acted without substantial justification throughout the unfair labor practice proceeding.

The issue of whether the General Counsel was substantially justified in pursuing any particular case must be determined on a case-by-case basis.[29] Although usually we will find that the General Counsel was substantially justified if the General Counsel introduced evidence during the underlying unfair labor practice proceeding which, if credited, would establish a prima facie case, such a showing is not always necessary to a finding of substantial justification[30] or always sufficient to prevent a finding that the General Counsel was not substantially justified.[31] However, if, as the judge found in the instant case, the General Counsel possesses no evidence in support of the allegations, we cannot find substantial justification.

Applying these considerations, we find the General Counsel was substantially justified in issuing the complaint on which the Applicant prevailed. When the complaint, alleging that fire coat production had been transferred in violation of Section 8(a)(3), issued on 9 February 1978, the General Counsel posesssed information tending to show the following: During the Union's organizing campaign, the Applicant had committed a number of 8(a)(1) violations and had threatened to close the Lake City plant and cancel expansion plans if the employees chose the Union as their collective-bargaining agent. On 31 August 1977, after the Union had won the election, the Applicant changed certain working condi-

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[29] *Enerhaul, Inc.*, 263 NLRB 890 (1982), reversed on other grounds 710 F.2d 748 (11th Cir. 1983).

[30] See *Woodview Rehabilitation Center*, 268 NLRB 1239, 1240 fn. 4 (1984); *Enerhaul*, supra.

[31] See *DeBolt Transfer, Inc.*, 271 NLRB 299, 303 fn. 7 (1984).

tions without notifying and bargaining with the Union. When the employees went on strike on 12 October 1977, the plant manager told one employee that the strikers were fired. About 2 weeks later, fire coat production was transferred to another plant and the Union received conflicting telegrams regarding the reasons for the transfer. Moreover, after the unfair labor practice charge concerning the October 1977 move was filed, the Applicant came forward with no evidence in support of its position, other than its 23 October telegram to to the Union and its various representations to the Union. Further, when the complaint issued in February 1978, it was clear that the "temporary" move had blossomed into a permanent relocation of the fire coat work to Beattyville, and no real evidence had been presented by the Applicant to counter balance the apparent discretionary motive for the move.[32] Considering these facts, we cannot agree

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[32] We reject the General Counsel's contentions that the Applicant's "[failure] to raise material defenses or to proffer supporting evidence" constituted "special circumstances mak[ing] an award unjust," within the meaning of sec. 504(a)(1) of EAJA. The legislative history of EAJA shows that the special circumstances defense available to the agencies is a "safety valve" designed to protect the government from EAJA awards "where unusual circumstances dictate that the government is advancing in good faith a credible, though novel, rule of law." H.R. Rep. 96—1418 at 14 (1980). This defense "also gives the court discretion to deny awards where equitable considerations dictate an award should not be made." Id. at 11. Since the General Counsel does not allege that the underlying case involved the advancement of a "credible, though novel, rule of law," and since we conclude that there are no equitable considerations present in this case that would dictate the denial of an award, we find that the Applicant's actions during the investigation stage of the unfair labor practice proceeding cannot support a conclusion that special circumstances, within the meaning of EAJA, are present here. (Rather, an applicant's response to the filing and investigation of unfair labor practice charges is only relevant to the issue of substantial justification. The General Counsel will be found to have acted with substantial justification in issuing a complaint whenever the General Counsel possesses, at the time the complaint is issued, evidence that could reasonably lead an administra-

with the Applicant's contention that the General Counsel should have accepted its unsupported claim of innocence and dismissed the charge. See, e.g., *Leeward Auto Wreckers*, 283 NLRB No. 85 (Apr. 7, 1987). Therefore, we find that the General Counsel was substantially justified in issuing the complaint on 9 February 1978, which alleged a Section 8(a)(3) violation in the October 1977 move.[33]

The General Counsel also excepts to the judge's findings that the General Counsel was not substantially justified in rejecting the Applicant's various settlement offers in 1978 and 1980, and in insisting that the Applicant return fire coat production to Lake City even after the Applicant sold its Lake City facility in September 1979 to FMK Apparel, Inc. We find merit to these exceptions of the General Counsel.

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tive law judge to find a violation and does not possess evidence that clearly would defeat an allegation that the charged party has violated the law. See *DeBolt Transfer, Inc.*, supra. A charged party has no obligation to provide evidence to the General Counsel during an investigation. See *International Maintenance Systems Group*, 267 NLRB 1136 (1983).)

[33] Our dissenting colleague claims that in finding the General Counsel substantially justified we have only focused on "what the General Counsel *actually* knew [when the complaint issued], rather than on both what the General Counsel actually knew and also reasonably should have known under the circumstances." He then lists two pieces of evidence, i.e., the 23 Oct. telegram and the various representations to the Union in negotiations, that he calls "unrebutted evidence" showing that the move was not discriminatorily motivated. Contrary to our colleague's indications, we have considered that evidence, as described above, and we conclude that based on the countervailing evidence likewise available, the General Counsel was substantially justified in issuing the complaint. In light of that countervailing evidence, and unlike our dissenting colleague, we do not deem the telegram and representations "unrebutted evidence" that the move was lawful.

As noted, the record in this EAJA proceeding [34] shows that the Applicant and the Region engaged in settlement

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[34] As it was originally enacted, EAJA did not define the term "record" or otherwise describe the body of evidence to which an agency should have looked when considering an EAJA application. The 1985 amendments, however, added the following language to sec. 504(a)(1): "Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought." The House Judiciary Committee's report on the amendments, H.R. Rep. No. 99—120 at 13, explained the change as follows:

> When the case is litigated to final decision by a court or adjudicative officer (or even when the case is settled after only some litigation procedures) the evaluation of the government's position will be straightforward, since the parties will have already aired the facts that led the agency to bring the action. No additional discovery of the government's [sic] position will be necessary, for EAJA petition purposes. *Dougherty v. Lehman*, 711 F.2d 555 561—562 (3d Cir. 1983).
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> When the case is conceded on the merits, dropped by the agency, or otherwise settled on terms favorable to the private party before any of the merits are heard, the court (or adjudicative officer) will again look to the record in the case to determine whether the position of the government was substantially justified. The record in this instance will consist of the pleadings, affidavits and other supporting documents filed by the parties in both the fee pro[ceeding] and the case on the merits.
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> Thus, the "substantial justification determination" will not involve additional evidentiary proceedings or additional discovery of agency files, solely for EAJA purposes.

Although congressional intent is now clear that evidentiary hearings are not to be held on the issue of substantial justification, there was no similarly clear directive at the time of the EAJA proceedings before the judge in this case. Furthermore, the instant EAJA case was litigated at a time when very few EAJA cases had been filed, and the case involved many issues of first impression. Thus, we find that the judge did not err by holding the hearing in this case, which included the litigation of matters relating to substantial justification. Furthermore, nothing in the EAJA amendments or their legislative history suggests that a record made before those amendments were enacted must be ignored

negotiations beginning in March 1978 and continuing at least until the hearing on the merits in the underlying unfair labor practice case in September 1980. However, in these negotiations the Applicant never offered unconditionally to return fire coat production to Lake City and to offer to rehire all of its former Lake City employees to make fire coats in Lake City, and the General Counsel therefore rejected all of the Applicant's offers. As noted above, one of the Applicant's settlement proposals, in which it admitted all complaint allegations and offered to reopen its Lake City facility for the production of products other than fire coats was approved by Judge Miller in 1978. Subsequently, however, as noted above, a three-member panel of the Board reversed the judge's approval of that unilateral settlement. In these circumstances, where the General Counsel was substantially justified in issuing the February 1978 complaint; where the Applicant had reneged on an earlier settlement agreement;[35] and where the General Counsel was on notice by the Board's decision reversing Judge Miller that reinstatement of the fire coat line would be an appropriate remedy if the General Counsel could prove the case, we find that the General Counsel was substantially justified in rejecting settlements which offered less than full reinstatement, e.g., the Applicant's June and August 1980 settlements. Though the case is complicated by the Applicant's sale of its facility in September 1979, nonetheless, as described

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by an agency reviewing such a record after the amendments became effective. Accordingly, we hold that the record in this case includes the evidence regarding the substantial justification issue adduced at the hearing on the Applicant's application for fees and expenses pursuant to EAJA.

[35] In August 1977 the Regional Director had approved a settlement agreement covering the various 8(a)(1) allegations which the Applicant has admitted throughout this proceeding. In November 1977 the Regional Director withdrew approval of that settlement based on the later allegation that the Applicant had violated Sec. 8(a)(5) by its August 1977 unilateral change, referred to above.

below, this fact does not ultimately change our conclusion that the General Counsel did not have to accept the Applicant's 1980 settlement offers.[36]

The judge in the instant proceeding, however, concluded that the General Counsel acted without substantial justification with regard to the settlement negotiations in three respects. First, having found that the General Counsel was not substantially justified in issuing the complaint alleging that the removal of fire coat production from Lake City was unlawful, he concluded that the General Counsel was not justified in settlement negotiations in requiring the relocation of such production to Lake City. Second, the judge concluded that the General Counsel acted unreasonably in refusing to investigate the Applicant's claims in June and August 1980 that a return of fire coat production to Lake City would cause financial hardship. Finally, the judge concluded that the General Counsel acted without substantial justification by continuing to insist, after the Applicant's September 1979 sale of the Lake City facility, that fire coat production be

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[36] Our dissenting colleague has set out much of the breadth of various of the Applicant's June and August 1980 settlement offers. We note, however, inter alia, that the June offer did not cover all former unit employees but only those then working for FMK, the company that had bought the Applicant's Lake City facility. The settlement also included no backpay offer. Contrary to our dissenting colleague, this clearly was not an offer of "what the General Counsel had been insisting upon all along . . . ." The Applicant's 12 Aug. offer (which was an alternative to the June offer) did extend to all former unit employees but it was only an offer to pay moving expenses for those who would accept employment at the Applicant's Beattyville facility. Lastly, we note the Applicant's 18 Aug. proposal did extend to all former unit employees but it had as a condition precedent, the same condition set out in the June offer, i.e., if fewer than 15 former unit employees then working at FMK desired to quit the new company and accept work at Lake City with the Applicant then there would be no fire coat work at Lake City for the unit employees who had not been working for FMK.

returned to Lake City. For the following reasons, we disagree with each of these conclusions.

Inasmuch as we have concluded, contrary to the judge, that the General Counsel was substantially justified in issuing the complaint, we cannot find that the General Counsel's actions regarding settlement efforts were unjustified because of the complaint's purported lack of merit. Also, as noted, in view of the Board's February 1980 rejection of the Applicant's proposal that was approved by Judge Miller in 1978, we cannot now find that the General Counsel should have accepted that proposal. As for the judge's second conclusion, we disagree with his characterization of the General Counsel's actions as a refusal to investigate the Applicant's claims of financial hardship. Contrary to the judge, we note that the Applicant did not argue there would be a financial hardship in restoring the fire coat line in June-August but rather a hardship in restoring it if fewer than a certain number of employees currently working at FMK accepted its offer. The Applicant had not at that time come forward with additional evidence which it later produced at the unfair labor practice hearing that a return of fire coat production to Lake City would have caused financial hardship. The absence of such evidence formed a large part of the Board's earlier decision to reverse Judge Miller's approval of the earlier 1978 settlement proposal and of our finding that the General Counsel was substantially justified in issuing the complaint in 1978. When finally that evidence was introduced at the September-October 1980 hearing on the merits of the unfair labor practice case, Judge Robertson, and later the Board, concluded that the removal of fire coat production did not constitute a violation of the Act. But it does not appear that the General Counsel was apprised of that evidence in June and August 1980 and we will not, at this date, and with respect only to the settlement negotiations, find fault in actions taken by the General Counsel at a time when the Appli-

cant's production of evidence of financial hardship might have altered the General Counsel's course of conduct.

Finally, we disagree with the judge's conclusion that the General Counsel acted without substantial justification in continuing to insist on the return of fire coat production to Lake City after the Applicant sold its Lake City facility in 1979. While the sale of the facility complicates the issue of whether the General Counsel was substantially justified in rejecting the Applicant's later settlement offers, we note that the Applicant itself had indicated in its 1980 offers that it would reopen a fire coat facility at Lake City. The Applicant, however, would do so only with certain stipulations. In the circumstances of this offer, and the Board's February 1980 decision, and not then having evidence going to the economic hardship of reopening at Lake City, the General Counsel was substantially justified in rejecting the Applicant's 1980 settlement offers.[37]

A conclusion that the General Counsel was substantially justified in prosecuting the complaint through the hearing stage flows logically from our findings that there was substantial justification for issuing the complaint and for rejecting the Applicant's settlement offers. Contrary to our dissenting colleague's assertion, much of the evidence relied on by the judge and the Board in dismissing the complaint was not known to the General Counsel prior to the commencement of the hearing. Our conclusion in this regard is supported by certain findings made by the judge in his decision in the underlying unfair labor practice case which conflict with certain findings he made in the instant EAJA proceeding. For example, the Applicant presented at the hearing, for the first time, the following evidence: The 24 October 1977 transfer was not planned until 21 October; the Applicant obtained

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[37] See generally *Temp Tech Industries v. NLRB*, 756 F.2d 586, 590-591 fn. 5 (7th Cir. 1985).

studies prior to the onset of the organizing campaign showing that expansion at Lake City would have been unduly expensive; the Applicant began looking for a larger facility in the early 1970's; after the strike began on 12 October, the Applicant fell behind on its production schedule and received complaints from customers about delays in filling orders; and the Applicant had planned to transfer fire coat production to the Beattyville facility, which was purchased shortly before the 14 July 1977 election, at some point in the future without regard to whether its Lake City employees became organized because Beattyville was the Applicant's largest facility. The judge relied heavily on this evidence in the underlying adjudication. In that decision, the judge stated, with a citation to *Wright Line*,[38] that "Respondent proved that the move was temporary and was necessitated by business reasons brought on by its employees' strike.[39]" The judge later in his decision in the unfair labor practice proceeding explained:

> In reaching this conclusion [that Applicant's October 1977 move did not violate the Act] I am bothered by evidence which tends to show that Respondent was motivated by its employees' union activities. In May 1977, Respondent's owner threatened employees that it would close the plant and cancel expansion plans because of the union activities. Those

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[38] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). In *Wright Line*, the Board established the following test for determining whether a respondent has engaged in unlawful discrimination:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. Id. at 1089 [footnote omitted].

[39] 259 NLRB 1145 (footnote omitted).

> threats *would have been persuasive* if Respondent had either closed the plant or canceled expansion activity without the intervention of other motivating events. . . . Moreover, Respondent's alleged illegal activity came at a time when any other action or inaction could have endangered its continued viability.[40]

We interpret these findings and the citation to *Wright Line* to mean that the judge in the unfair labor practice proceeding found that the General Counsel had established a prima facie voilation of the Act in the transfer of fire coat production but that the Applicant's rebuttal evidence showed the Applicant did not, in fact, violate the Act.[41]

Nevertheless, in his Decision in this EAJA proceeding, the judge stated, "[T]here was unrebutted evidence demonstrating that Applicant relocated its Lake City operations in October 1977 solely because of its inability to meet production because of the strike. I believe the General Counsel acted unreasonably by ignoring that evidence. There was no evidence showing the relocation was illegally motivated [footnote omitted]," and the judge here has also stated, "there was no causal connection [shown between the Section 8(a)(1) violations and the relocation] and overwhelming evidence proved the relocation was caused by Applicant's inability to meet production because of the strike." In reaching these conclusions here, however, the judge failed to take account of his *Wright Line* citation in the earlier case and the voluminous evidence set out above which the Applicant introduced at the hearing for the first time; of which the

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[40] 259 NLRB at 1145-1146 (emphasis added).

[41] We have previously noted (see text accompanying the citation to *DeBolt*, fn. 31 above) that the presence of a prima facie case does not always establish that the General Counsel was substantially justified in bringing a complaint allegation but we do not perceive the facts here to be similar to those in *DeBolt*.

General Counsel was not aware until the hearing; and on which the judge relied in dismissing the 8(a)(3) allegation.[42] Also, the judge's conclusion that there was "no causal connection" between the various 8(a)(1) violations and the relocation allegation appears premised in part on the Applicant's rebuttal evidence which was not available to the General Counsel until the unfair labor practice hearing.

Similarly, the judge's conclusion in the instant proceeding that the "General Counsel offered no evidence showing that Applicant violated Section 8(a)(5) by its October 1977 relocation," is inconsistent with his findings in the underlying case. In the earlier case, he found that "Respondent did not afford the Union an opportunity to negotiate before the October 24 move." (259 NLRB at 1144.) He also noted the conflicting telegrams sent to the Union at the outset of the strike concerning the reasons for the strike.[43] It is clear that the Applicant did not bargain about the move, an ostensible mandatory subject of bargaining. Instead, it presented the Union with a fait accompli and one the General Counsel, based on the available facts, could allege as an 8(a)(5) violation. In his earlier decision, the judge found that the Applicant had established that business considerations justified its failure to bargain with the Union before the temporary relocation of fire coat production.[44] The evidence that

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[42] We agree with the judge and the Applicant that the General Cousel must have known that the strike was successful. However, this knowledge, standing alone, would not necessarily require the General Counsel to conclude that the transfer of fire coat production was not unlawfully motivated or that the Applicant was economically justified in transferring tho work without prior discussion with the certified collective-bargaining representative.

[43] Our dissenting colleague is therefore in error when he indicates the judge made no reference in the underlying case to evidence submitted by the General Counsel in support of this allegation.

[44] The judge cited *Empire Terminal Warehouse Co.*, 151 NLRB 1359 (1965), for this conclusion.

supported this defense included evidence presented by the Applicant to rebut the 8(a)(3) allegation, and was, as noted above, unavailable to the General Counsel before the hearing. Therefore, we find that the General Counsel also was substantially justified in pursuing through the hearing the allegation that the Applicant had unlawfully refused to bargain with the Union before fire coat production was transferred.[45]

However, we agree with the judge that the General Counsel was not substantially justified at the hearing in including an allegation that the Applicant violated Section 8(a)(5) of the Act on 5 January 1978. On that date, the Applicant notified the Union that it had "tentatively concluded" not to return fire coat production to Lake City because such a move would not be feasible for economic reasons. The letter announcing the tentative decision also stated that the Applicant was "prepared to discuss any aspect of this matter, including the tentative conclusion itself, in good faith." Thus, the letter on its face does not announce any final decision reached without bargaining and it clearly offers to bargain about the tentative decision and its consequences. The General Counsel offered no evidence that could support a conclusion that the Applicant violated Section 8(a)(5) on 5 January 1978. Under these circumstances, we find that the General Counsel was not substantially justified in pursuing an allegation at the hearing that a violation of Section 8(a)(5) occurred on that date. Nonetheless, we find that the Applicant is not entitled to an award in connection with this allegation because this allegation was not a "significant and discrete" substantive part of the proceeding. The Applicant's defense to the allegation

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[45] As noted above at fn. 13, this allegation was not included in the second complaint that issued in February 1978 but was added by way of amendment at the September 1980 hearing to the first complaint. A portion of our dissenting colleague's opinion might be construed to indicate that this allegation was part of a complaint as it originally issued but that is not correct.

necessitated no discernible additional effort on the part of the Applicant in litigating the underlying case. Primarily, this part of the Applicant's defense was based on the plain language of its 5 January 1978 letter, the same language the Board relied on in affirming the judge's dismissal of the allegation and on which we now rely in finding that the allegation was not substantially justified. To the extent that the Applicant relied on evidence that the relocation was motivated solely by economic considerations, that same evidence was relevant to the 8(a)(3) allegation. Thus, because the allegation that was made without substantial justification was so closely related to the allegations that were made with substantial justification, the Applicant suffered no measurable expenditure recoverable under EAJA and no award will be made therefor.[46]

Having found that the Applicant is entitled to no award in connection with the issuance of the complaint on which the Applicant prevailed, we must decide whether the General Counsel was substantially justified in pursuing the case after the Applicant introduced the evidence on which the judge and the Board relied in dismissing the unfair labor practice case. We find that the General Counsel was substantially justified in continuing the prosecution of the case. Although the Applicant's rebuttal evidence, on which the judge and the Board ultimately relied, was introduced during the unfair labor practice hearing, the General Counsel was not obligated to move for the dismissal of the work removal allegations on the introduction of that evidence. The General Counsel could not know, before the judge's decision issued, whether the judge would credit the Applicant's witnesses' testimony or its other evidence, or the relative weight that would be given by the judge to the General Counsel's evidence and the Applicant's evidence. Accordingly, we conclude that

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[46] See *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *Goldhaber v. Foley*, 698 F.2d 193, 197 (3d Cir. 1983).

the General Counsel was substantially justified in continuing the case through the close of the hearing and in submitting the posthearing brief to the judge.

For similar reasons, we find that the General Counsel was substantially justified in continuing the unfair labor practice case to the next readily identifiable stage of the proceedings, i.e., the filing of exceptions with the Board. Although the Board did not find the exceptions persuasive, the judge's decision in the unfair labor practice case was susceptible to reasonable arguments regarding its findings of fact and conclusions of law. For example, both the 8(a)(3) and (5) allegations regarding the relocation of the Applicant's product line were determined, in large part, by findings regarding the Applicant's motivations for the relocation. In this regard, the judge acknowledged that the Applicant had shown "apparent union animus" and that it had engaged in an "illegal anti-union campaign"; as noted above, the judge was "bothered by evidence which tends to show that Respondent was motivated by the employees' union activities." [47] In addition to these findings of the judge, we note that the Applicant made several contradictory statements regarding its plans for the Lake City facility and its intentions regarding the Beattyville operations. Thus, in May 1977 the Applicant admittedly violated Section 8(a)(1) of the Act by telling employees that it had canceled plans to expand the Lake City facility because of the employees' union activities; on 23 October 1977 the Applicant informed the Union that the removal of the fire coat product line to Beattyville was caused by the strike and that it was temporary; on 24 October the Applicant's attorney informed the Union that the move was needed because there was not enough room for expansion at Lake City; in subsequent negotiations with the Union, the Applicant took the position that the move was temporary; and, on

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[47] 259 NLRB at 1145.

5 January 1978, the Applicant informed the Union of its tentative decision to make the transfer of fire coat production from Lake City to Beattyville permanent. In view of the above, the Board's agreement with the judge's conclusions that the removal of the product line was motivated by business considerations rather than union animus and that the relocation was a reasonable measure necessary to maintain operations during the strike does not warrant a finding that the General Counsel acted without substantial justification in filing exceptions to the judge's decision. EAJA does not require the General Counsel to prevail in the unfair labor practice proceeding in order to avoid an award of fees and expenses. Rather, it requires that the General Counsel establish that the actions during those proceedings were substantially justified.[48] Although the General Counsel did not succeed in the attempt to persuade the Board to reverse the judge's underlying decision, we find that the attempt was substantially justified.

In sum, we conclude that the General Counsel acted with substantial justification throughout the underlying unfair labor practice proceeding.[49] The General Counsel possessed significant relevant evidence that warranted the issuance of the complaint. Thereafter, the General Counsel was substantially justified in arguing to the judge and the Board that the Applicant's rebuttal evidence, which was not made available to the General Counsel until the hearing, was insufficient to require the dismissal

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[48] See *University of New Haven*, 279 NLRB No. 43, slip op. at 4-5 (Apr. 14, 1986); *Bennington Iron Works*, 278 NLRB No. 159, JD slip op. at 2 (Mar. 20, 1986).

[49] Accordingly, we find it unnecessary to pass on any of the judge's findings or conclusions regarding the fees and expenses allegedly incurred by the Applicant during the unfair labor practice and EAJA proceedings or regarding the General Counsel's actions during the EAJA proceeding before the judge.

of the complaint. Accordingly, we will dismiss the application.

ORDER

The application of the Applicant, Lion Uniform, Janesville Apparel Division, Lake City, Tennessee, for an award under the Equal Access to Justice Act is dismissed.

Dated, Washington, D.C. 7 August 1987

WILFORD W. JOHANSEN, Member

MARSHALL B. BABSON, Member

JAMES M. STEPHENS, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

CHAIRMAN DOTSON, dissenting.

In agreement with the administrative law judge, and contrary to my colleagues, I find that the General Counsel was not substantially justified in alleging (1) that the Applicant violated Section 8(a)(3) of the Act by discriminatorily relocating its fire coat production from its Lake City facility in October 1977 and (2) that the Applicant violated Section 8(a)(5) by unilaterally, without bargaining with the Union, relocating its fire coat production in October 1977.[1] Also, again in agreement with the judge and contrary to my colleagues, I find that the General Counsel was not substantially justified in rejecting the Applicant's settlement proposals and in insisting, as an absolute condition of settlement, that the Applicant relocate its fire coat production back to its Lake City facility.[2] Additionally, I agree with the judge that there are no "special circumstances" in this case that would make an award to the Applicant unjust.

I find the judge's discussion and analysis of the above issues to be thorough and persuasive. I subscribe to it and have no need to supplement it. Moreover, my colleagues have failed to counter effectively the judge's analysis and disposition of these issues.

In finding that the General Counsel was substantially justified in alleging that the Applicant's relocation of its fire coat production from Lake City was discriminatorily motivated, my colleagues focus narrowly—and incom-

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[1] My colleagues agree with the judge, and I join them in this regard, that the General Counsel was not substantially justified in alleging that the Applicant violated Sec. 8(a)(5) by unilaterally deciding in January 1978 not to return its fire coat production to its Lake City facility.

[2] As my colleagues have noted, the Board has revised Sec. 102.144(a) of its Rules and Regulations, regarding substantial justification. In this regard, I find that the position taken by the General Counsel in this case does not fall within even a broad scope of the standard of substantial justification.

pletely—merely on what the General Counsel *actually* knew, rather than on both what the General Counsel actually knew and also reasonably should have known under the circumstances. The General Counsel had actual knowledge, of course, of (1) the Applicant's admitted violations during the summer of 1977 (more than 3 months prior to the allegedly discriminatory relocation of fire coat production); (2) the Applicant's independent tightening of work rules and discontinuance of its practice of making coffee for employees and permitting them to use the company phone to place lunch orders at restaurants; and (3) the plant manager's statement to an employee (2 weeks before the relocation of fire coat production) that all striking employees were "fired." But, as found by the judge in the instant Equal Access to Justice Act (EAJA) case as well as the underlying unfair labor practice proceeding, the General Counsel *also* had reason to know that (as set forth in the Applicant's 23 Oct. telegram to the Union, and made clear to the Union in subsequent negotiating sessions) (1) the Applicant was temporarily relocating its fire coat production from Lake City simply and solely because the strike at Lake City made it temporarily impossible for the Applicant to continue production at that facility, and (2) that the Applicant expressed its complete willingness at that time to return fire coat production to Lake City as soon as the Lake City employees returned to work. Thus, I agree with the judge that the General Counsel acted unreasonably in ignoring unrebutted evidence available to the General Counsel, and of which the General Counsel had reason to know, that in October 1977 the Applicant temporarily relocated its fire coat production from Lake City solely because it was unable to produce fire coats at Lake City during the strike, and not for discriminatory reasons as unreasonably alleged by the General Counsel.[3]

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[3] In this regard, I specifically agree with the judge that although violations of Sec. 8(a)(1) may indirectly contribute to a deter-

Similarly, in agreement with the judge and contrary to my colleagues, I find that the General Counsel was not substantially justified in alleging that the Applicant refused to negotiate with the Union about the temporary relocation of fire coat production from Lake City. In finding that the General Counsel was substantially justified in this regard, my colleages assert that the judge's conclusion in the instant EAJA proceeding, that the General Counsel offered no evidence showing that the Applicant violated Section 8(a)(5) by its October 1977 relocation, is inconsistent with the judge's findings in the underlying unfair labor practice case.[4] However, I see no inconsistency between the judge's assessment of the lack of substantial justification for the General Counsel's allegation in this regard in the instant EAJA proceeding, and the judge's similar assessment of lack of evidence from the General Counsel in support of this allegation in the underlying unfair labor practice case.

Indeed, there is no such inconsistency as asserted by my colleagues. More specifically, in the underlying unfair labor practice case, the judge makes no reference whatsoever to any evidence presented by the General

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mination of illegal motive, there must be some causal connection between the asserted evidence of animus and the alleged illegal action—a causal connection not present, or even indicated, in the instant case.

Leeward Auto Wreckers, 283 NLRB No. 85 (Apr. 7, 1987), relied on by my colleagues in this general context, is fully distinguishable. In *Leeward*, unlike in the instant case, there was no objective exculpatory evidence available to the General Counsel, during the investigatory stage, to counter the incriminatory evidence of unlawful activity obtained by or otherwise then available to the General Counsel. Instead, the Applicant in *Leeward* simply contended itself in this regard with the oral expression of belief on the part of its labor consultant that the Applicant's unilateral subcontracting of unit work was not unlawful, because the collective-bargaining agreement did not expressly prohibit subcontracting.

[4] *Lion Uniform*, 259 NLRB 1141 (1982).

Counsel in support of this allegation of failure or refusal on the part of the Applicant to bargain with the Union about the temporary relocation of fire coat production from Lake City. Rather, the judge expressly stated in the unfair labor practice proceeding that "The record provided no basis on which I could find Respondent violated Section 8(a)(3) or (5) by its October 24 move." (259 NLRB at 1145.) Moreover, in the underlying unfair labor practice case, the judge found that the Applicant did notify the Union on the same day as the relocation of fire coat production that this relocation was only temporary, brought on by the strike. This evidence of good faith on the part of the Applicant was of course fully available, through the Union, to the General Counsel during the course of a reasonable investigation of the unfair labor practice charges. Additionally, in the underlying unfair labor practice case the judge found unrebutted evidence, in the form of, inter alia, testimony from the *Union's* district director as well as from the Applicant's attorney, that on several occasions during the 10-week period following the relocation of fire coat production the Applicant advised the Union in meetings that the relocation was only temporary and that fire coat production would be returned to Lake City as soon as the strike was over. This evidence of openness and direct dealing on the part of the Applicant in this regard was also fully available, through the Union, to the General Counsel in the course of a reasonable investigation of this charge. Indeed, in the underlying unfair labor practice case, the judge expressly found that the record established that the Applicant "engaged in good-faith negotiations with the Union *beginning in October 1977*" (259 NLRB at 1145, emphasis added)—i.e., immediately on temporarily relocating its fire coat production.

Contrary to my colleagues, there is nothing in the judge's treatment of this issue in the instant EAJA case

that is inconsistent with his treatment of it in the underlying unfair labor practice case, as summarized above. On the contrary, his treatment of this matter in both forums is entirely consistent. Thus, the judge's assessment in the instant EAJA case that "the General Counsel offered no evidence showing that the Applicant violated Section 8(a)(5) by its October 1977 relocation" is entirely consistent with his assessments in the underlying unfair labor practice case that "[t]he record provided no bisis on which I could find Respondent violated Section 8(a)(3) or (5) . . ." and, "There was no evidence offered demonstrating that Respondent's move to Beattyville transcended the 'reasonable measures necessary in order to maintain operations in such circumstances.'" [5] The judge rejected the General Counsel's assertion that the Union was presented with a fait accompli by the Applicant's 23 October 1977 telegram advising the Union of the temporary relocation of fire coat production from Lake City. Instead, the judge found that facts available to the General Counsel and the Union prior to the issuance of the complaint in the underlying unfair labor practice indicated no such fait accompli. More specifically, the judge found that the General Counsel had available, through the Union, prior to the issuance of the complaint alleging a violation of Section 8(a)(5) in this regard, (1) the Applicant's telegram to the Union advising it that the relocation of fire coat production from Lake City was only temporary, brought on by the strike; and (2) evidence that the Applicant met and in fact negotiated with the Union on six separate occasions during the 10 weeks following the relocation—including on 25 October, the day immediately following the relocation itself. Charged—and correctly so—with the knowledge of these exculpatory

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[5] Id. at 1145, citing, *Empire Terminal Warehouse Co.*, 151 NLRB 1359 (1965) (dismissing an allegation of unlawful refusal to bargain about temporary subcontracting of work, under circumstances remarkably similar to those in the underlying unfair labor practice case).

matters prior to the issuance of the complaint, the General Counsel has failed to establish substantial justification in alleging that the Applicant failed and refused to bargain about the temporary relocation of fire coat production from Lake City. In arguing to the contrary, my colleagues ultimately—and simply—rely on their same flawed argument that the General Counsel was substantially justified in alleging that the Applicant's relocation of its fire coat production from Lake City was discriminatorily motivated—an argument which the judge also correctly rejected, as summarized above.

Having found that the General Counsel acted unreasonably, i.e., without substantial justification, in alleging that the Applicant acted unlawfully in relocating its fire coat production from Lake City, logic alone would compel me to find also that the General Counsel acted unreasonably, i.e., without substantial justification, in rejecting all of the Applicant's numerous offers to settle these unreasonably alleged matters without recourse to an unfair labor practice hearing. However, while such an analysis based on logic alone would be sufficient, it would not tell the story of the General Counsel's particular unreasonableness in rejecting the Applicant's numerous settlement offers.

The history of the settlement negotiations in this case is extensive. As seen, the Applicant temporarily relocated its fire coat production from Lake City on 24 October 1977. In a 9 February 1978 complaint, the General Counsel alleged that this relocation was discriminatorily motivated, in violation of Section 8(a)(3) of the Act. This complaint was consolidated with others involving the Applicant. At the outset of the first unfair labor practice hearing into these consolidated matters (on 15 May 1978 before Administrative Law Judge Michael O. Miller),[6] the Applicant offered, by way of settlement, to

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[6] *Lion Uniform*, 247 NLRB 992 (1980).

withdraw its answers to all unfair labor practice allegations and to submit itself to the issuance of a formal remedial order, provided only that the Applicant be permitted to reopen the Lake City facility with a product line different from the fire coat line which it had been producing for 4 or 5 years at the time of the strike and subsequent relocation of fire coat production from Lake City. By offering to withdraw its answers to all unfair labor practice allegations, and subject itself to the issuance of a full remedial order (with the one proviso mentioned, that the Applicant be permitted to reopen Lake City with a product line different than fire coats), the Applicant was prepared, for the purposes of settlement, to admit to the following allegations: interrogations of employees about their union sympathies and activities; threats of discharge, loss of wage increases, cancellation of plant improvement and expansion, and plant closure, if the employees selected the union as their collective-bargaining representative; and unilateral changes in several terms and conditions of employment. The Applicant was also willing to admit that the 12 October 1977 strike which precipitated the relocation of fire coat production from Lake City was either caused or prolonged by the above-listed unfair labor practices to which the Applicant was willing to admit, and that the relocation of fire coat production to Lake City was discriminatorily motivated, in response to the union or other protected activities of the employees.

The General Counsel and the Union nevertheless opposed the Applicant's settlement offer, on the grounds that only the return to Lake City of fire coat production itself could properly remedy the alleged discriminatory relocation of fire coat production from Lake City. Thereafter, the judge limited the hearing to the issue of whether the Applicant's offer to reopen Lake City for production of articles other than fire coats would satisfactorily remedy the Applicant's admitted (for settle-

ment purposes) unlawful relocation of fire coat production from Lake City.

Instead of the fire coats, which it had been producing at Lake City for about 4 or 5 years at the time it relocated such production, the Applicant offered instead to produce knit shirts at Lake City. The Applicant also advised that as product lines changed, it was possible that other products would be manufactured at Lake City by these employees. The Applicant further agreed that it would bargain with the Union regarding the startup of production and all conditions of employment, including production standards, to assure that the employees would have their former or substantially equivalent positions. The Applicant contended, in essence, that the job of the Lake City employees was "cutting and sewing," and that this was so regardless of whether the cutting and sewing was on fire coats, shirts, or other garments. The General Counsel and the Union opposed the proffered settlement, asserting that the work of manufacturing the fire coats was still available, that no unreasonable burden prevented the return of the work to Lake City, that the employees were entitled to reinstatement on unconditional offer to their former jobs, and that those former jobs involved the manufacture of fire coats, not shirts.

The usual reinstatement remedy for employees who have been unlawfully discharged or otherwise deprived of their jobs is reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions. In this regard, the judge found that following the relocation of fire coat production from the 16,000-square-foot Lake City plant to the 54,000-square-foot plant in Beattyville, about 100 miles away, production of fire coats increased from 600—800 per week at Lake City to 1100—1200 per week at Beattyville, where fire coat production occupied 30,000 square feet—almost twice the space available for fire coat production at Lake City. Thus, the judge found that due to the growth of fire coat

production following its relocation from Lake City, it had become physically impossible to return fire coat production to Lake City. The judge also noted that the Applicant's vice president for manufacturing had testified without contradiction that multishift operations are neither practical nor acceptable in the garment industry, and that because of the delivery requirements and the duplication of machines and supervision that would be required, producing fire coats at *both* Beattyville and Lake City would not be feasible. Accordingly, the judge found that the Applicant would suffer an undue hardship if required to restore the status quo ante by reinstituting the production of fire coats at Lake City. Under these circumstances, the judge found that, as a practical matter, the particular former work of fire coat production at Lake City was no longer available, for purposes of remedying the admitted (for settlement purposes) unlawful relocation of fire coat production from Lake City, and that the Applicant would instead be required to offer to Lake City employees work that was substantially equivalent to fire coat production.

The judge next considered the question of whether the production of knit shirts and other garments was substantially equivalent to the production of fire coats for purposes of effectively remedying the relocation of fire coat production from Lake City. Based on an analysis that is commendable for its implicit, yet clear, understanding and appreciation of what is truly important in these remedial areas, the judge found that the production of knit shirts and other garments at Lake City was *at least* substantially equivalent to the production of fire coats, and was therefore a satisfactory remedy for the relocation of fire coat production from Lake City, inasmuch as the production of fire coats at Lake City was no longer available. The judge stated:

> That there are distinct differences between firecoats and knit shirts is obvious . . . . Nonetheless,

the manufacture of both requires that fabric be spread and cut, the edges of the fabric be serged (stitched to prevent unraveling), pieces such as collars, cuffs, and pockets be sewn together, and the various components of the garment assembled and sewn. The machines used to manufacture both garments are at least similar and, in many cases, are identical. . . .

Moreover, as Respondent pointed out, the Lake City plant has not always made firecoats. Until 4 or 5 years ago, various garments including jeans, zip suits (coveralls) and jackets were made in that plant . . . . Indeed, at Respondent's other plants various types of garments, from pants to caps, are made, with the same employees being retrained as necessary to go from one to the other.

The work on the firecoats was steady and reliable. There were few layoffs and employees were able to stay with one machine for long periods of time. They knew the garments, their machines, and the work which was expected of them. The General Counsel has asserted that the work on knit shirts (or other garments) will not be the same or substantially equivalent because some employees will have to learn to operate different machines, become familiar with new production standards, and may be more subject to layoffs because the new product lines might not be as steady as the old. However, even prior to the advent of the Union, these employees had no assurance that they would not be required to work on a product other than the firecoats and that such a change might not require them to learn new machines, standards, and tasks. Moreover, in regard to the fears of layoffs or reduced earnings because of different production standards, I am satisfied that so long as Respondent complies with the requirements of this Order and its obligation to bargain with the

> Union, the employees will suffer no diminution in these aspects of their employment.[7]

Thus, the judge concluded that the Applicant's offer of settlement would provide a remedy "virtually identical" to that which might have been achieved after complete litigation of this matter, and that it would effectuate the purposes of the Act to accept the Applicant's settlement offer.

Nevertheless, the General Counsel (and the Union) filed exceptions with the Board to Judge Miller's June 1978 approval of the Applicant's settlement offer. During the pendency of those exceptions before the Board, the Applicant continued to attempt to settle these matters. Throughout 1978, the General Counsel continued to insist, as a condition of settlement, that the Applicant return fire coat production to Lake City. The Applicant was agreeable to the settlement terms proposed by the General Counsel, except that the Applicant sought to substitute production of other garments for fire coats at Lake City. Ultimately, the Applicant sold its Lake City facility in September 1979. The purchaser, FMK Apparel, Inc., was required, as a condition of purchase, to employ the Applicant's Lake City employees at the time and also assume the Applicant's obligation to recognize and bargain with the Union.

On 11 February 1980 the Board rejected Judge Miller's approval of the Applicant's settlement offer, and remanded the case for a further hearing on the merits of the unfair labor practice allegations. The Board rejected the judge's determination that, under the particular facts of this case, the Applicant would suffer an undue hardship if it were required to reinstitute the production of fire coats at Lake City, and the judge's conclusion that as a practical matter, the particular work of fire coat production was no longer available for purposes of pre-

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[7] 247 at 997.

cisely remedying an unlawful relocation of fire coat production from Lake City. In rejecting the judge's determination that it was not feasible under the circumstances for the Applicant to transfer fire coat production back to Lake City, the Board noted that prior to the advent of the Union and the subsequent relocation of fire coat production, the Applicant had announced plans to expand the Lake City facility. The Board saw no evidence that the Applicant could not now follow through on those earlier announced plans for expansion of the Lake City facility, without endangering the Applicant's economic viability, or at least rent additional production facilities at Lake City, so as to be physically able to accommodate in Lake City a production operation that was by then almost twice as big as the operation that had been relocated from Lake City less than 7 months before.[8]

Nevertheless, the Applicant continued its settlement efforts following the Board's February 1980 rejection of Judge Miller's approval of the Applicant's settlement offer. On 12 June 1980, about 8 months after the Applicant's sale of its Lake City facility to FMK, the Applicant made a major concession. It proposed to the General Counsel that the Applicant offer the following alternatives to the approximately 27 former employees of the Applicant then working for FMK:

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[8] Regardless of whether a strict insistence by the Board on a return to a precise status quo ante might be desirable under other circumstances, it seems to me (in retrospect, to be sure) that such an insistence was perhaps questionable under the instant circumstances, where the Applicant sought only one demonstrably reasonable, factually supported economic concession—substitution of knit shirts and other products for fire coats as the products to be manufactured at Lake City. Part of the basis for the Board's rejection of the Applicant's settlement offer was the Board's finding that the production of knit shirts and other products did not guarantee absolutely full and uninterrupted employment to the Lake City employees—guarantees which the Board implied had been provided by the production of fire coats, but which Judge Miller, in the excerpted passage above, had found were not so certain.

1. If 15 or more of these 27 employees wanted to quit FMK and work for the Applicant making fire coats at Lake City, then the Applicant would establish *a new fire coat production facility in Lake City, at which the Applicant would duplicate the terms and conditions of employment that would have applied if fire coat production had never left Lake City.* The employees would be paid the same wages being paid to the Applicant's employees then working at the Applicant's fire coat production facility in Beattyville; or,

2. If fewer than 15 of the 27 former Applicant employees then working for FMK wanted to quit FMK and go to work for the Applicant under the conditions described above,[9] then in lieu of establishing a new fire coat production facility in Lake City, the Applicant would offer the 27 former employees the choice of either (a) a job at the Applicant's Beattyville fire coat facility, with moving expenses paid by the Applicant; or (2) a payment of $1000, for those employees who no longer wished to work for the Applicant.

Thus, the Applicant was now offering what the General Counsel had been insisting upon all along—return of fire coat production to Lake City, conditioned only on the willingness of a small but essential number of former employees to rejoin the Applicant for that purpose. But the General Counsel rejected even this settlement proposal. He counterproposed that (1) the former strikers receive backpay; (2) "relief" be provided for former strikers that were not then employed at FMK; and (3) fire coat production be relocated to Lake City even if less than 15 former Applicant employees working at FMK wanted to go back to work for the Applicant. Also, the

[9] The Applicant advised the General Counsel that it was "absolutely unwilling to assume the extreme financial hardship" that would result from operating with less than 15 employees.

General Counsel requested assurance from the Applicant that production of fire coats at Lake City would resume no later than December 1980—6 months away. The Applicant pointed out that such a time schedule would be impossible inasmuch as, inter alia, the Applicant no longer owned any real estate or buildings in Lake City and its former facility was now owned and used by FMK.

On 12 August 1980 the Applicant made yet another offer, as an alternative to its 12 June settlement offer. Under the alternative, the Applicant would offer jobs and pay moving expenses to Beattyville for all employees employed by the Applicant at the time of the October 1977 strike. Again, the General Counsel rejected this offer also, still insisting that any settlement would have to include return of fire coat production to Lake City.

Settlement efforts were ultimately fruitless, and the unfair labor practice hearing in this matter began on 8 September 1980 before Administrative Law Judge J. Pargen Robertson.[10] On the second day of the hearing, the judge questioned the counsel for the General Counsel as to how he could insist that the Applicant reopen a fire coat production facility in Lake City if FMK, an acknowledged successor to the Applicant, was already operating the Lake City facility with some of the Applicant's former employees. The General Counsel's position remained fixed: The Applicant must return fire coat production to Lake City as an absolute condition to settlement.

As to the merits of the unfair labor practice allegations that the Applicant violated Section 8(a)(3) and (5) by discriminatorily and unilaterally relocating fire coat production from Lake City,[11] and Section 8(a)(5) by

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[10] 259 NLRB 1141 (1982).

[11] As the majority notes, the allegations of unlawful unilateral relocation of fire coat production was not included in the complaint

subsequently unilaterally deciding not to return fire coat production to Lake City, Judge Robertson found that the Applicant did not act unlawfully in any way in transfering fire coat production from Lake City.[12] The Board fully affirmed the judge in these regards.[13]

Like Judge Robertson, and contrary to my colleagues, I am convinced by the foregoing that the General Counsel acted unreasonably, without substantial justification, in insisting on a return of fire coat production, and nothing other than fire coat production, to Lake City as an absolute condition to accepting a settlement in this case. Nor do I find the General Counsel's lack of substantial justification in this regard excused by the Board's February 1980 rejection of Judge Miller's approval of the Applicant's settlement offer. As seen above, within 4 months of the Board's decision in that regard, the Applicant had offered what the General Counsel had been insisting on—return of fire coat production to Lake City, provided only that at least 15 former employees would be willing to join the Applicant in the venture.

A finding that the General Counsel lacked substantial justification in rejecting the Applicant's settlement proposals is first of all, of course, a logical consequence of my finding that the General Counsel lacked substantial justification in the underlying allegations of unlawful activity. But, in addition to that basis for finding a lack of substantial justification on the part of the General Counsel in rejecting the Applicant's settlement proposals, I particularly agree with Judge Robertson's assessment in footnote 10 and the final two paragraphs of section 2 of his decision, that the General Counsel was not sub-

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that issued in Feb. 1978, but was added by way of amendment at the Sept. 1980 hearing.

[12] The judge also found that the strike which precipitated the relocation of fire coat production was not an unfair labor practice strike.

[13] 259 NLRB at 1141.

stantially justified in failing to investigate the Applicant's claim of financial hardship regarding the General Counsel's unwavering insistence on the return of fire coat production to Lake City as an absolute condition for settlement, even after the Applicant's arm's-length sale of its Lake City facility to FMK.[14]

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[14] My colleagues' reliance on *Temp Tech Indstries v. NLRB*, 756 F.2d 586 (7th Cir. 1985), in support of their contrary position in this regard is misplaced. In *Temp Tech*, the court found that the Board did not abuse its discretion in finding that the General Counsel did not act unreasonably in deciding to litigate the alleged unlawful discharge of a picketing employee who was found to have assaulted a nonstriking employee as the latter attempted to cross the picket line. In finding no abuse of discretion by the Board in its finding of substantial justification on the part of the General Counsel in this regard, the court relied on the fact (1) that the administrative law judge in the underlying unfair labor practice proceeding apparently dismissed the allegation of unlawful discharge on the basis of a credibility resolution adverse to the General Counsel, and (2) that even if the General Counsel had known *in advance* that its principal witness was going to be discredited, the allegation of unlawful discharge still might have been substantially justified, on the basis that under *either* version of the incident in question, it nevertheless might have been found to be picket line misconduct not of such an egregious, violent, or serious character as to render the employee unfit for further employment, and thus not sufficiently egregious to justify, under the Act, the discharge of the employee for engaging in it. Having found the General Counsel's decision to litigate the matter substantially justified, the court rejected the company's argument that the General Counsel had to further justify his decision to reject the company's settlement proposal which, by the company's own admission, could not have provided the full relief that the General Counsel would have achieved had he prevailed, and which would have lacked the enforceability of a Board order. Thus, *Temp Tech* is clearly inapposite to the instant case, which involves no determinative credibility resolution on the issue in question—relocation of fire coat production from Lake City; certainly no concession on the part of the Applicant that its proposed settlement provided anything short of full relief; and clearly no question that remedial orders incorporating the Applicant's 1980 settlement offers would have been anything less than fully enforceable Board orders.

The legal principles applicable to this issue are relatively few, and easy to state and comprehend. The Board has broad discretion to approve settlement of unfair labor practice charges.[15] It has long had the policy of encouraging settlements which tend to eliminate industrial strife, encourage the collective-bargaining process, and protect the rights established by the Act.[16] Within this context, the Board's broad discretion to dismiss unfair labor practice charges through settlement should be exercised only when the unfair labor practices are substantially remedied and when such a dismissal would effectuate the policies of the Act.[17] Thus, in determining whether a settlement should be approved, the Board must weigh the risks involved in protracted litigation which may be lost in whole or in part, the early restoration of industrial harmony by making concessions, and the conservation of the Board's resources.[18] Therefore, while it is certainly not the Board's policy to promote uncritical, blind, or blanket acceptance of settlements,[19] the Board must evaluate the legal and factual merits of the unfair labor practice charges, as disclosed by an administrative investigation, to determine whether the allegations of violations in the complaint can be so clearly proved that nothing less than the maximum remedy can be accepted in the settlement.[20]

Thus, even though, in my view, the General Counsel acted unreasonably, without substantial justification, in alleging that the Applicant acted unlawfully in relocating

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[15] *Textile Workers*, 294 F.2d 738, 741 (D.C. Cir. 1961); *Farmers Co-Operative Gin Assoc.*, 168 NLRB 367 (1967).

[16] *ESB Inc.*, 246 NLRB 325 (1979). See also *Wallace Corp. v. NLRB*, 323 U.S. 248, 253-254 (1944).

[17] *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957).

[18] *Farmers Co-Operative Gin*, supra, 168 NLRB at 367.

[19] *Passavant Memorial Hospital*, 237 NLRB 138, 139 fn. 4 (1978).

[20] *Farmers Co-Operative Gin*, supra, 168 NLRB at 367.

its fire coat production from Lake City, the General Counsel nevertheless had repeated opportunities, following the issuance of the complaint, to avoid the consequences of this unreasonable and costly course of action, by agreeing to any one of the Applicant's several settlement offers. Unfortunately for all concerned—the employees, the Union, the Applicant, and this Agency—the General Counsel pressed forward on its errant and costly course, unreasonably rejecting the Applicant's repeated offers to settle this case.

In light of my foregoing findings that the General Counsel was not substantially justified in alleging that the Applicant violated Section 8(a)(3) and (5) of the Act by discriminatorily and unilaterally relocating fire coat production from Lake City, and in specifically insisting on return of fire coat production to Lake City as an absolute condition for settlement of the entire case against the Applicant, I find, contrary to my colleagues, that the General Counsel was not substantially justified in prosecuting the complaint through the hearing stage. Contrary to my colleagues, and for the reasons discussed more fully above and in the judge's EAJA decision,[21] I find that the General Counsel knew or had reason to become aware of, through the conduct of a thorough investigation of the instant unfair labor practice charges, the evidence favorable to the Applicant which was ultimately relied on by the judge and the Board in dismissing the unfair labor practice allegations in question.

It follows, then, that I also disagree with my colleagues' findings that the General Counsel was substantially justified in the continued prosecution of this case after the Applicant actually introduced at the hearing the evidence on which the judge and the Board relied in dismissing the unfair labor practice allegations in question. As seen, I find that this exculpatory evidence should

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[21] See the final six paragraphs of sec. (a), slip op. at 11-12, of the judge's attached decision.

already have been known to the General Counsel through a thorough prehearing investigation.

Consequently, I find, contrary to my colleagues, that the General Counsel was not substantially justified in filing posthearing exceptions to Judge Robertson's dismissal of the complaint allegations in question.

My colleagues in the majority have determined that the Applicant is not entitled to an award of any fees or expenses incurred in its successful defense against the unfair labor practice allegations in question and in its prosecution of the instant EAJA proceeding. While I disagree, I nevertheless find that no material purpose would be served by a solitary review and analysis by me of Judge Robertson's considerations and determinations of the reasonableness of specific fees and expenses claimed by the Applicant, and those ultimately awarded by the judge, in the attached decision. Thus, I do not pass on this aspect of the judge's decision.

The purpose of the Equal Access to Justice Act is to correct the situation under which certain parties may be deterred from defending against or seeking review of unreasonable governmental action, because of the expense involved in securing the vindication of their rights in civil actions or in administrative proceedings, such as those conducted under the National Labor Relations Act.[22] The EAJA attempts to diminish this effect by providing, where appropriate, an award of fees and expenses incured by a party who prevails against the government. More simply stated, the governing principle of the EAJA is that the United States should pay those expenses which are incurred when the government presses a position that is not substantially justified during litigation.[23]

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[22] See Equal Access to Justice Act (EAJA), sec. 202, Pub. L. 96-481, 94 Stat. 2325 (1980).

[23] See *DeBolt Transfer, Inc.*, 271 NLRB 299 (1984).

In my view, the decision of my colleagues in the majority in this case does nothing to advance, and much to undermine, the purpose and governing principle of the Equal Access to Justice Act. I decline to join them in this matter.

Dated, Washington, D.C. 7 August 1987

DONALD L. DOTSON,
Chairman
NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
ATLANTA, GEORGIA

Case Nos. 10-CA-12938(E)
10-CA-13089(E)
10-CA-13284-2(E)

LION UNIFORM, JANESVILLE APPAREL DIVISION

and

OIL, CHEMICAL AND
ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO

Stuart Weisberg and George Card, Esqs., of Atlanta, GA, on behalf of the General Counsel.

Daniel G. Rosenthal and Hope Martin Frye, Esqs., of Cincinnati, OH, on behalf of the applicant.

DECISION

Statement of the Case

J. PARGEN ROBERTSON, Administrative Law Judge: Applicant, pursuant to the Equal Access to Justice Act, 5 U.S.C. 504 et seq., seeks fees and expenses through June 29, 1983, for its successful defense of an unfair labor practice complaint and for its prosecution of this claim under the Equal Access to Justice Act (EAJA).

On February 19, 1982, Applicant filed with the National Labor Relations Board, an Application to recover

fees and expenses under the EAJA. Applicant based its claim upon its defense to an underlying unfair labor practice proceeding entitled *Lion Uniform, Janesville Apparel Div.*, 259 NLRB 1141 (1982). On February 23, 1982, the Board ordered that the application be referred to the undersigned Administrative Law Judge. By order dated April 22, 1982, the undersigned denied General Counsel's March 26, 1982 motion to dismiss the application. This EAJA proceeding resulted in a hearing in Atlanta, Georgia, on May 16, 17, 18, 19, and 20, 1983.

Upon the entire record, including the record of the EAJA proceedings, and the underlying unfair labor practice proceedings, and briefs filed by General Counsel and Applicant, I hereby make the following:

FINDINGS

Elibility:

The EAJA provides that certain parties may recover fees, including reasonable attorney fees, when they prevail in actions brought by the government. In order to qualify for those fees it is initially essential for the Applicant to qualify as a party as that term is defined in the EAJA. The portion of the EAJA defining "party" in certain administrative agency actions reads in material part:

> (W)hich is *a corporation* but excludes (i) any *corporation* whose net worth exceeded $5,000,000 at the time the adversary adjudication was initiated * * * and (ii) any *corporation* having more than five hundred employees at the time the adversary adjudication was initiated (5 USCA 504 (b)(1)(B)).

General Counsel argues in accord with the Board's Rules and Regulations, that the above language requires Applicant to prove "both that its net worth was not more than five million dollars and that it employed not more

than five hundred employees." The statute expresses that any "Corporation" qualifies under the EAJA except those with a net worth in excess of five million dollars and with more than five hundred employees.

The manner in which the statute was drafted presents confusion. As shown in the above quote, Section 504 (b) (1) (B), sets forth those corporations that are excluded from the Act's application. Those excluded, according to the wording, include corporations that satisfy two criteria (i.e., over five million dollars in net worth and over five hundred employees). The converse, i.e., those covered by the statute, may include any corporation that satisfies any of the following conditions:

> (1) a net worth that does not exceed five million dollars and an employee complement that does not exceed five hundred;
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> (2) a net worth that does not exceed five million dollars even though its employee complement exceeds five hundred; and
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> (3) an employee complement that does not exceed five hundred even though its net worth exceeds five million dollars.

In the September 30, 1980, Senate House Conference Report on the Equal Access to Justice Act, the following statement is made regarding Section 504 (b) (1) (B) of Title 5:

> 16. AGENCY ACTIONS—THOSE ELIGIBLE TO CLAIM
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> The Senate bill defines prevailing parties eligible for such awards as including individuals and certain entities, except: in the case of individuals, those whose net worth at the initiation of the adversarial proceeding exceeded $1 million; and, in the case of entities, those whose net worth at the initiation of the adversarial proceeding exceeded $5 million or

> who had more than 500 employees. Charitable tax exempt organizations so designated under 501(c)(3) of the Internal Revenue Code and Agricultural co-ops defined in the Agricultural Marketing Act are exempt from the monetary ceiling.

That language from the Conference Report is similar to the Conference Report regarding EAJA eligibility in judicial proceedings:

> 28. JUDICIAL PROCEEDINGS—THOSE ELIGIBLE TO CLAIM
>
> The Senate bill defines prevailing parties eligible for an award to include individuals and certain entities, except: in the case of individuals, whose net worth at the initiation of the adversarial proceeding exceeded $1 million; and, in the case of entities, those whose net worth at the initiation of the adversarial proceeding exceeded $5 million or who had more than 500 employees. Charitable tax exempt organizations so designated under 501(c)(3) of the Internal Revenue Code and Agricultural co-ops defined in the Agricultural Marketing Act are exempt from the monetary ceiling.

The EAJA itself, in the section dealing with eligibility in certain judicial proceedings, states, in material part:

> (B) 'party' means *(ii) a *corporation* whose net worth did not exceed five million dollars at the time the civil action was filed, * or (iii) a *corporation* having not more than five hundred employees at the time the civil action was filed (28 USCA 2412 (d)(2)(B)).

Although drafted in different styles, it would appear from the Conference Report, that 28 USCA 2412 (d)(2)(B), is similar in meaning to 5 USCA 504 (b)(1)(B). Different subject matter coverage, among other things, dictated a separate drafting for the administrative and

judicial provisions of the EAJA. Perhaps, additionally, the various sections were prepared by different draftsmen. Nevertheless, a reading of the various sections along with consideration of the Conference Report, illustrates that the Act may be read to include corporations with either (1) five hundred or fewer employees; or (2) a net worth of five million dollars or less.[1]

General Counsel also argues that Applicant's eligibility should not be determined as of the date the original complaint was filed.

The underlying unfair labor practice litigation involved cases numbers 10-CA-12938, 10-CA-13089, and 10-CA-13284-2. The original pleading, which was a consolidated complaint in Cases 10-CA-12938 and 10-CA-13089, was filed on November 17, 1977. However, that complaint did not include matters in which Applicant was the prevailing party. Subsequently, on February 9, 1978, a complaint issued in Case 10-CA-13284-2, along with an order consolidating the three cases for hearing. Finally, on September 9, 1980, during the underlying hearing, the consolidated complaint was amended. Both the February 2, 1978, complaint in Case 10-CA-13284-2, and the September 9, 1980, amendment, include matters in which the Applicant prevailed.

The argument of General Counsel is rooted in the fact that the February 2, 1978, and September 9, 1980, pleadings involve the matters in which Applicant prevailed. Those are the dates, according to General Counsel, on which the material adjudications commenced. However, neither the statute nor the Board's Rules and Regulations appear to agree with General Counsel. The statute provides that eligibility of the applicants shall be determined "at the time the adversary adjudication was initiated." (5 USCA 504 (b) (1) (B)).

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[1] Nevertheless, as shown below, the instant Applicant proved its eligibility under both standards.

The Board's Rules and Regulations indicate that eligibility shall be determined "as of the date of the complaint." (Section 102.143(d))

In view of the above, I find that the Appellant is eligible under the EAJA if the facts establish its eligibility on November 17, 1977, the original date of the filing of the consolidated complaint in these proceedings. However, I shall also consider whether Applicant satisfied the eligibility requirements on February 9, 1978, the date the second complant was filed. I find no reason to consider whether Applicant satisfied the eligibility requirements on September 9, 1980, the date the complaint was amended. Neither the statute nor the Board's Rules and Regulations provide for consideration of an amendment date in determining eligibility.

Net Worth:

During the hearing the Applicant offered expert testimony and documentary evidence regarding its net worth. Net worth was calculated by subtracting total liabilities from total assets. Applicant's fiscal year runs from the first week in August through the last week in July. Through use of Applicant's balance sheet and monthly financial statements, Applicant offered expert testimony that its balance sheet net worth was $3,191,289 on November 17, 1977, and $3,271,757 on February 9, 1978.

Applicant also offered evidence as to the net worth of its principal stockholder, Clarence Lapedes. Mr. Lapedes' net worth was $298,693 on November 17, 1977, and was $221,011 on February 9, 1978. General Counsel argues that Mr. Lapedes' net worth should be added to that of Applicant in consideration of Section 102.143(g) of the Board's Rules and Regulations.

General Counsel also offered expert testimony regarding Applicant's net worth. The expert called by General Counsel testified that Applicant's net worth as shown on

Applicant's balance sheet, was prepared through use of generally accepted accounting principles and had been audited through use of generally accepted auditing standards. However, General Counsel's expert quarreled with Applicant's deduction of accumulated depreciation.

The following appears in the legislative history of EAJA, "in determining value of assets, the cost of acquisition rather than fair market value should be used." General Counsel offered expert testimony which was contested through Applicant's expert witness, that acquisition cost refers to the purchase price of an asset without regard to depreciation. Applicant's expert testified that the term "acquisition costs" in the above phrase refers to the first step in accounting for fixed assets.

Basically the above disagreement referred to the practice of subtracting accumulated depreciation from net assets. General Counsel argues that accumulated depreciation should not be subtracted from net assets. General Counsel argued in its brief that accumulated depreciation which was subtracted from Applicant's assets totalled $447,994 on November 17, 1977, and $504,164 on February 9, 1978.

General Counsel also argued in opposition to Applicant, that Applicant should not be permitted to deduct contributions to its employees option plan, allowances for doubtful accounts to the extent those allowances were not off-set by actual bad debt expenses, and deferred income tax. Those respective amounts totalled $235,000, $19,000, and $21,000 on November 17, 1977, and $245,000, $4,250, and $14,000 on February 9, 1978.

General Counsel also contends that Applicant's balance sheet should include an asset for value for trademarks and goodwill. However, no evidence was offered by General Counsel to off-set Applicant's evidence that those items are valueless in this particular instance.

In view of the above, it is apparent that I need not resolve the issues raised in General Counsel's contentions. If General Counsel's contentions are accepted for the sake of argument, it is apparent that Applicant's net worth, measured by inclusion of Clarence Lapedes' net worth and re-inclusion of accumulated depreciation, contributions to employees stock option plan allowances for doubtful accounts, and deferred income tax, total less than the eligibility limit of $5 million. Those figures would show Applicant's net worth to be $4,242,976 on November 17, 1977, and $4,258,182 on February 9, 1978. Therefore, I find that Applicant proved that its net worth fell within the eligibility limits at all material times.

Number of Employees

Section 102.143(f) of the Board's Rules and Regulations indicates for purposes of an Applicant's eligibility under the EAJA, the term employee shall include all persons who regular perform services for remuneration for the Applicant, under Applicant's direction and control. "Part time employees shall be included on a proportional basis."

Both General Counsel and Applicant agree that the term "employee" as used above, is distinct from the normal use of that term under the NLRA.

Applicant offered evidence that its employee count was 432.6 on November 17, 1977, and 436.6 on February 9, 1978. Those figures do not include 54 employees on strike at Applicant's Lake City, Tennessee, facility.

As shown in the underlying unfair labor practice Decision (See 259 NLRB 1141 (1982)), Applicant's Lake City employees struck from October 12, 1977, until May 16, 1978. There is no doubt that those strikers would be considered employees under the NLRA. However, it is equally clear that on the material dates of November 17, 1977, and February 9, 1978, the strikers were not regu-

larly performing services for Applicant under Applicant's direction and control. Moreover, since Applicant found it necessary on October 24, 1977, to relocate its Lake City operation and employ others to perform work formerly handled by the strikers, a count which would include both the strikers and the workers at the relocated facility would not give a true picture of the size of that operation. Therefore, I find that the Lake City strikers were not employees of Applicant on November 17, 1977, and on February 9, 1978. Applicant and General Counsel agree there were 54 strikers on each of those dates.

General Counsel also contended that the employee count should include "extra" workers. Evidence indicated that those employees were hired to complete a specific contract (called the Navy contract) which ran from the fall of 1977 into the summer of 1978. On November 17, 1977, six of those employees who were not otherwise included in Applicant's employee count, were employed at Applicant's Jellico, Tennessee, plant. On February 9, 1977, Applicant employed 13 extras at its Jellico plant that were not included in its employee count.

I agree with General Counsel. Those extra employees were regularly performing services under Applicant's direction and control at material times. By including those employees, Applicant's employee count should be 438.6 on November 17, 1977, and 449.6 on February 9, 1978.

General Counsel also argues that an additional six employees should be shown on Applicant's employee count for February 9, 1978, from its Williamsburg, Kentucky, plant. The Williamsburg plant was shut down during the February 9 week. Applicant elected to show as Williamsburg employees, the average number of employees for the week before and the week after February 9. General Counsel points out that that procedure omits six employees that were working when the plant temporarily shut down. Again I agree with General Counsel. There

is no indication that those six employees should not be considered in the employee count for February 9, 1978. By including those employees, Applicant's February 9, 1978, count totals 455.6. The count for November 17, 1977, remains 438.6.

General Counsel argues that the employee count should include four outside members of Applicant's Board of Directors. I disagree. The sole remuneration received by each of those individuals totalled $250 for expenses for each Board of Directors meeting. None of the four performed services under Applicant's direction and control. Actually, it is Applicant that operates under the direction and control of the Board of Directors. Therefore, I find that the Board of Directors who are neither officers of Applicant nor are otherwise employed by the Applicant, do not qualify as employees under the Equal Access to Justice Act.

General Counsel also argues that Applicant's method of computing part time employees is slightly inaccurate and that the February 9, 1978, numbers should be 5.29 part-time employees rather than the 5.1 found by Applicant. Assuming the General Counsel is correct, the February 9, 1978, count should be 455.79. General Counsel also argues that employees Faye McGhee and Louise Hooks should be included in the Applicant's employee count. However, the evidence proved that both McGhee and Hooks ceased working for Applicant before November 17, 1977.

In consideration of the entire record, I find that Applicant's actual employee count was 438.6 on November 17, 1977, and no more than 455.79 on February 9, 1978. I find that Applicant's total employee complement did not exceed 500 at any material time.

In view of the above, I find that Applicant has established its eligibilty for consideration of the merits of its claim for fees under the EAJA.

The Merits of Applicant's Claim

The underlying litigation revolved around a production line relocation issue. General Counsel alleged in that underlying proceeding that Applicant illegally relocated its Lake City, Tennessee, firemen's clothing production operation to Beattyville, Kentucky, on October 24, 1977, and that Applicant engaged in further illegal activity by making that relocation permanent on January 5, 1978.[2]

General Counsel and Applicant agree that Applicant prevailed in the unfair labor practice proceeding on the relocation issue. That issue constitutes a significant and discrete portion of the unfair labor practice allegations. The question left is whether General Counsel was substantially justified in pursuing the relocation issue to its ultimate demise before the Board.

Substantial Justification

The issue, under the circumstances here, must be broken down into three parts, namely:

1. Was General Counsel substantially justified in alleging that Respondent illegally relocated its Lake City, Tennessee, firemen's clothing production line?

2. Was General Counsel substantially justified in continuing to insist that any settlement must include relocation of Applicant's former Lake City firemen's clothing operation back to Lake City?

3. Whether special circumstances existed that should preclude an award?

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[2] The issue does *not* involve a contention that an entire plant was permanently relocated. After the Union ended its strike at Applicant's Lake City, Tennessee, facility, Applicant reopened the Lake City facility. However, the production of firemen's clothing, which occurred at Lake City before the strike, was never resumed at that facility.

(a) *Was the relocation allegation substantailly justified?*

The legislative history of the Act includes several references to the term substantially justified. Efforts to require a more rigid standard of "arbitrary" or "capricious" were defeated. However, comments demonstrate that the substantially justified standard must not rest on whether the government won its case. Rather, the test should be one of reasonableness whether "the government can show that its case had a reasonable basis both in law and fact." General Counsel has the burden of proving substantial justification.

As shown in the underlying unfair labor practice decision, following certification the Union struck Applicant's Lake City facility on October 12, 1977. The strike was successful. Applicant's Lake City production was seriously curtailed. Only supervisors and a few employees crossed the picket line.

On October 23, 1977, Applicant wired the Union that it was relocating the Lake City operation because of the strike. On October 24, the Lake City operation was moved to Beattyville, Kentucky. Also, on October 24 the Union was sent another wire, this wire coming from one of the Applicant's attorney's, stating the relocation was needed because of insufficient room to expand at Lake City. However, in contract negotiations which started on October 25, 1977, and continued on November 1, 2, and 28, and subsequently, Applicant assured the Union that the Lake City relocation came about when it became apparent that it could not meet production at Lake City due to the strike and that the move was temporary. (See *Lion Uniform*, 259 NLRB 1141, 1145 (1982)). The above facts were never in dispute. All those facts were available to the Regional Office through the Union who was the Charging Party in the relocation charge.[3]

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[3] Case 10-CA-13284-2 was filed on November 30, 1977. Complaint in that case issued on February 9, 1978.

During the underlying unfair labor practice proceeding and in the instant hearing, General Counsel offered no evidence showing that its investigative file contained matters showing that Applicant's October 24, 1977, relocation was precipitated by anything other than the Union's October 12, 1977, strike. The evidence before me demonstrates that General Counsel and the Charging Party Union knew long before complaint issued on February 9, 1978, that the Lake City operation was relocated because the Union's strike had curtailed production.

During the underlying unfair labor practice hearing, General Counsel called the Union's District Director, John Williams. Mr. Williams admitted that during negotiating sessions before January 5, 1978, Applicant consistently told him that they planned to return the firemen's clothing line to Lake City when the strike ended.

By letter dated January 16, 1978, Mr. Williams received a packet from Applicant's attorney which included minutes from several negotiating sessions including the session of November 2, 1977. Those November 2, 1977, minutes read in part:

> The meeting began at 9:00 a.m. Williams opened the meeting with a question concerning the Company's transfer of work out of the Lake City plant. He said there is no sense in our negotiating if the Company has decided to close the plant. I told Williams that the Company had some pressing customer requirements for fire coats and that the Company first thought it could handle those requirements by utilizing employees who were not going to honor the picket line. I explained that it quickly became apparent that that plant would not work. Williams acknowledged that this was so. I stated that the Company then determined that the only way it could satisfy its customers was by having the coats made at other plants of the Company. I explained that

this was a temporary transfer and that when the strike ended, the work would be transferred back to Lake City.[4]

On January 5, 1978, Respondent delivered to John Williams a letter containing the following:

> In order to save its fire coat and other Lake City business during your strike, the Company moved the production elsewhere. The move presented many difficulties and caused a considerable interruption in the supply of garments to its customers.
>
> Production of fire coats, etc., is now proceeding, although demand is making it difficult to meet schedule.
>
> The Company has tentatively concluded that it cannot run the business risks of attempting to relocate the fire coat and other Lake City production back in Lake City again. This tentative conclusion is based on very serious business problems—the interruption which would occur if machinery and materials had to be rolocated, the risk of loss in transit, the risk of higher production costs in reassembling and possibly retraining a work force in Lake City, and the further delays in shipment to customers which would occur if anything went wrong in starting up again at Lake City.
>
> We are prepared to discuss any aspect of this matter, including the tentative conclusion itself, in good faith.
>
> The Company does plan to resume production, but of other products, at Lake City, when the strike is over.

The following appears in the underlying unfair labor practice decision:

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[4] "I" refers to the writer of the minutes, Attorney Richard A. DuRose.

> There was no evidence offered demonstrating that Respondent's move to Beattyville transcended the 'reasonable measures necessary in order to maintain operations in such circumstances.'
>
> *Empire Terminal Warehouse Company*, 151 NLRB 1359 (1965). Despite Respondent's apparent union animus as evidenced by its illegal antiunion campaign, the record shows that Respondent engaged in good-faith negotiations with the Union beginning in October 1977. Moreover, when the strike ended, Respondent reinstated the striking employees and announced to its employees that it denounced actions which did not fully respect the employees' rights to associate with the Union. Furthermore, following its move, Respondent continuously took the position in its discussions with the Union that it would provide work for the employees at Lake City.
>
> I find that this case falls within the scope of the rule announced in *Empire Terminal Warehouse Company, supra*, which held that similar conduct by an employer does not constitute violative action. (259 NLRB 1141, 1145)

It is correct, as stated in the underlying unfair labor practice Decision, that Applicant engaged in illegal unfair labor practice activities during the summer and fall of 1977. However, as shown above, there was unrebutted evidence demonstrating that Applicant relocated its Lake City operations in October 1977 solely because of its inability to meet production because of the strike. I believe the General Counsel acted unreasonably by ignoring that evidence. There was no evidence showing the relocation was illegally motivated.[5]

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[5] Although it is true that Section 8(a)(1) violations may indirectly contribute to a determination of illegal motive, (See 259 NLRB at 1145) there must be some causal connection between the evidence of animus and the alleged illegal action. Here there was no

Moreover, it should have been apparent to any reasonable person that the relocation was caused by nothing more than Applicant's efforts to produce its product. Therefore, I find the General Counsel was not substantially justified in alleging that Applicant violated Section 8(a)(3) by relocating its Lake City firemen's clothing production on October 24, 1977.

Additionally General Counsel alleges that the Applicant violated Section 8(a)(5) by refusing to negotiate regarding the October 24, 1977, relocation and the January 5, 1978, decision to make that relocation permanent. In its brief, General Counsel argues that Applicant's October 23, 1977, wire presented the Union with a *fait accompli.* The facts which were available to General Counsel and the Charging Party before the complaint issued, indicate otherwise. On October 23, 1977, the Union was on strike at Applicant's Lake City facility. Applicant, in its October 23 telegram to the Union and during subsequent negotiations, assured the Union that work would resume in Lake City when the strike ended. The Union had ample time to put Applicant to the task by ending the strike and demanding resumption of the Lake City operations. The Union did not do so until May 1978, at which time Applicant reopened the Lake City facility and recalled the strikers.

The facts which were available to General Counsel and Charging Party demonstrate the urgency of Applicant's relocation. Applicant advised the Union of its decision on October 23. Thereafter Applicant met and negotiated with the Union on several occasions beginning on October 25. There was no indication that Applicant ever refused to negotiate regarding its relocation at Lake City. In fact, minutes of those meetings which were possessed by the Union, show that Applicant continually

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causal connection and overwhelming evidence proved the relocation was caused by Applicant's inability to meet production because of the strike.

offered to resume Lake City operations as soon as the strike ended.

As indicated in the underlying proceeding, General Counsel offered no evidence showing that Applicant violated Section 8(a)(5) by its October 1977 relocation.

Moreover, as to the Applicant's January 5, 1978, offer to negotiate over its tentative decision to permanently relocate firemen's clothing in Beattyville, the Union refused Applicant's offer to negotiate (see 259 NLRB 1146). Therefore, Applicant did not have an opportunity and, of course, it was not necessary for it to demonstrate the economic basis for its decision.[6]

I have reached the above findings on the basis of documents which were admittedly included in the General Counsel's investigative file before the 10-CA-13284-2 complaint issued on February 9, 1978, and on the basis of other matters which I shall presume were known to General Counsel.

Throughout proceedings leading to this EAJA hearing, General Counsel took the position that it would not disclose contents of its investigative unfair labor practice file. Therefore, although stipulations were received which show that General Counsel received certain documents from Applicant during the unfair labor practice investigation and the Applicant did not produce other documents, the record did not disclose precisely what General Counsel's investigative file contained.

Nevertheless, General Counsel has the burden of proving substantial justification. With that in mind, based upon my knowledge that it is the policy of the General Counsel to thoroughly investigate all unfair labor practice charges, I shall presume that the Regional Office was

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[6] Nevertheless, according to unrebutted testimony, Applicant offered its books to the Union in order to demonstrate the economic basis for its January 5, 1978, action.

aware of material evidence noted above which was possessed by the Charging Party.[7]

In that regard I find on the basis of stipulations that the General Counsel was aware of the telegrams sent by Applicant to the Union on October 23 and October 24, 1977. I find, in part through presumption, that the General Counsel was aware of events that transpired during negotiating sessions between the Union and Applicant on October 25, November 1, 2, and 28, December 15 and 16, 1977, and on January 4, 5, 6, 23 and 24, March 21, May 24, and September 14, 1978. General Counsel had available union officials that attended those sessions and, in may cases, minutes of the meetings taken by Applicant which were mailed to the Union.[8]

Additionally, I shall presume that the General Counsel was aware through interviews with union officials and strikers of the successful nature of the October 12, 1977, strike at Lake City.

On the basis of the above and the entire record, I find that General Counsel failed to prove that it was substantially justified in alleging that Respodent violated the Act by temporarily and permanently relocating its Lake City firemen's clothing operations.

2. *Was General Counsel unreasonable in refusing settlement*:

It follows that General Counsel was unreasonable in refusing settlement in view of my finding that the ma-

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[7] Reasonable investigation of the 8(a)(3) and (5) charges would include examination of minutes of negotiation meetings possessed by the Union, and all correspondence between the Applicant and the Union.

[8] For example, Respondent's Exh. 2 in the underlying proceeding is a January 16, 1978, letter from Applicant to the Union which includes, among other things, minutes of the October 25, November 1, 2, and 28 negotiating sessions.

terial complaint allegations had no basis in fact or law. However, my findings here after do not rest exclusively on the unjustified complaint allegations.

As early as March 22, 1978, through a letter from one of the Applicant's attorney's, Applicant made overtures to the Regional Office to settle the outstanding unfair labor practices through a formal settlement. On March 24, 1978, the Regional Office responded by mailing Applicant a rough draft of a settlement agreement. The letter expressed that the enclosed proposal was not absolute. As to the relocation remedy the Region's proposed settlement required:

> Take the following affirmative actions to effectuate the policies of the National Labor Relations Act, as amended:
>
> (a) Return its firecoat product line work from Beattyville, Kentucky to Lake City, Tennessee and reestablish its Lake City, Tennessee facility and operation to the condition in which it existed prior to October 12, 1977. Employees will be made whole for loss of backpay except during periods where they were engaged in or precluded from working by a strike.
>
> (b) Reinstate employees to their former or substantially equivalent positions of employment upon their unconditional application to return to work discharging replacement employees hired on and after October 12, 1977, if necessary.

Throughout 1978, the Regional Office continued to insist as a condition of settlement, the return of the firemen's clothing operation to Lake City, Tennessee. Applicant was agreeable to the terms proposed by the Region except Applicant sought to provide reasonably equivalent positions at Lake City rather than the precise jobs involved in firemen's clothing production.

As shown in the underlying decision, (259 NLRB 1141), Applicant's proposed settlement was approved in a decision issued by Administrative Law Judge Miller on June 8, 1978. The Board reversed Administrative Law Judge Miller on February 11, 1980 (247 NLRB 992).

According to Applicant's attorney Dean Denlinger, he continued settlement efforts after General Counsel and Charging Party appealed Administrative Law Judge Miller's decision.

After Administrative Law Judge Miller's decision, Applicant sold its Lake City facility on September 28, 1979. The terms of that sale included a requirement that FMK (the buyer) employ Applicant's existing Lake City employees, and assume Applicant's obligation to recognize the Union and maintain the existing terms and conditions of employment.

Applicant was advised by its attorney Denlinger that it appeared unlikely that the General Counsel would prevail on the relocation allegations. However, Denlinger advised that if General Counsel was able to prove what he claimed, a remedy requiring relocation to Lake City could be imposed. Applicant instructed its attorney that it could not afford the expense and risk of returning its entire firemen's clothing production to Lake City. Therefore, Mr. Denlinger was instructed that he was to use any possible means within reason to settle the case. Even though Applicant no longer owned a facility at Lake City, Tennessee, it advanced a settlement proposal to the region on June 12, 1980 which included:

> I am writing to suggest a full settlement of the Lion Uniform case. I would suggest that, in return for your dismissal of the case, Lion offer the following alternatives to those former Lion bargaining unit employees who continue to work at FMK Apparel, Inc. These employees number approximately 27.
>
> 1. If 15 or more of the former Lion bargaining unit employes who now work for FMK wish to quit FMK

and accept jobs working for Lion Uniform making fire coats in Lake City, Lion would create a fire coat manufacturing facility in Lake City. Lion would duplicate the terms and conditions of employment that would have applied if the work had never moved out. These employees will receive the same wage rate presently in effect at Lion's fire coat manufacturing facility in Beattyville, Kentucky. Lion is absolutely unwilling to assume the extreme financial hardship that would result from operating with any fewer than 15 employees.

2. If fewer than 15 of those FMK employees are willing to leave FMK and work for Lion, Lion would not create a facility in Lake City.

Instead, it would offer those FMK employees the following alternatives:

(a) The Company would pay the moving expenses for those who wish to accept employment at Lion's plant in Beattyville, Kentucky.

(b) Those who do not wish to work for Lion would each receive a payment of $1,000.00.

Lion must know as soon as possible whether it will have to establish an operation in Lake City. Similarly, FMK must be informed as to whether it will retain its current employees. Therefore, it will be vital to Lion, and probably to FMK, for those FMK employees who wish to exercise option Number 1 to submit the attached resignation to FMK within five days of execution of the proposed settlement.

Lion has not finally approved this settlement. I am submitting it first to you to see if the Board would approve of it. If the Board approves, I will recommend that Lion settle the case on these terms. Please let me know if you have any questions or comments.

Following the above letter, Dean Denlinger requested a meeting with the Region in their Atlanta office. That meeting was held on June 30. Although Denlinger requested the chance to meet with the Regional hierarchy including the Regional Director, Regional Attorney, and Assistant Regional Director, none of those people attended the meeting. The Region objected to Applicant's June 12 settlement proposal and suggested:

1. Strikers should receive backpay;

2. Relief should be provided for former striker that were not then employed at FMK;

3. Firemen's clothing should be relocated to Lake City even though fewer than 15 FMK employees desire reinstatement by Applicant.

Additionally, the Region requested assurance from Applicant that Lake City production would begin no later than December 1978. Applicant pointed out that such a time schedule would be impossible in view of Applicant status, i.e., among other problems, it owned no real estate or buildings in Lake City and its former facility was being used by FMK. The Region also took the position that Lake City employees should earn the same rates as the employees at Beattyville, that Applicant must agree in the settlement to provide fire coat production at Lake City for as long as fire coats were manufactured at Beattyville, and the Region strongly intimated that they wanted Richard Lapedes to be the Lake City plant manager.[9]

On October 12, 1980, Applicant's attorney Dean Denlinger expanded his settlement offer to the Region:

> This letter is to set forth in writing the settlement alternative I suggested to Mr. Card in our recent telephone conversation. As an alternative to the set-

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[9] Richard Lapedes is the son of principle owner Clarence Lapedes.

> tlement proposal made in my June 12, 1980 letter to you, I offer the following.
>
> As to all individuals employed at Lion in bargaining unit positions at the time of the 1977 strike, Lion would pay the moving expenses of those who wish to accept employment at Lion's plant in Beattyville, Kentucky. As you know, this is the typical remedy imposed by the Board in situations like this case.

On August 18, 1980, Applicant again wrote the Regional Office: On that occasion Applicant's attorney stated in his letter that the proposal was firm (i.e. it had been approved by Applicant).

On August 21, 1980, Denlinger and another attorney for Applicant, Bob Brown, met with the Region to discuss settlement. On that occasion, the meeting included "the Regional Director at least briefly."

Denlinger testified that his August 18 proposal was rejected in the "extremely brief" August 21 meeting at the Regional office. The Region demanded that settlement must include returning the "fire coat production" from Beattyville to Lake City.

During the second day of the underlying unfair labor practice hearing, the undersigned Administrative Law Judge met with all the parties to consider settlement. Upon learning of the sale to FMK of all the Lake City properties, the undersigned asked General Counsel if a successorship now existed (i.e., was FMK Applicant's successor in Lake City), and if General Counsel anticipate any allegation of improper conduct regarding Applicant's sale to FMK. General Counsel indicated that it had no intent at that time to contend that the sale to FMK involved illegal activity. The undersigned then questioned General Counsel as to how it could insist that Applicant reopen a facility in Lake City if FMK, who was then operating the Lake City facility with some of Applicant's former employees, was a successor. It was suggested that

Counsel for General Counsel check this matter with the Regional Office. Subsequently, the undersigned was informed that the Region's position remained fixed, i.e., Applicant must return the firemen's clothing to Lake City as an absolute condition to settlement.

The above facts convince me the General Counsel acted unreasonably regarding Applicant's settlement proposals. Obviously, the Region was unjustified in requiring relocation of firemen's clothing to Lake City in view of the lack of merit of the material complaint allegations.

Moreover, the Region also acted unreasonably in refusing to pursue investigation of Respondent's several claims of financial hardship regarding return of the firemen's clothing (e.g. Applicant's letters to the Region dated August 18, 1980 and June 12, 1980, quoted above).[10]

Finally, General Counsel acted without substantial justification by continuing to insist as a condition of settlement, that Applicant return its fire clothing production to Lake City, following Applicant's arms length sale of its Lake City operation to FMK.

(3) *The Special Circumstances*:

In its answer to the application, General Counsel alleged "there are 'special circumstances' which make an award unjust." In its brief, Counsel for General Counsel

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[10] General Counsel argues that Applicant unreasonably failed to offer evidence regarding financial hardship. However, Applicant raised the question with the Regional Office on several occasions and the Region demonstrated no interest in pursuing that issue.

The Regional Director has an obligation to investigate unfair labor practice charges and that obligation does not terminate upon receipt of the Charging Party's evidence (see e.g. Section 102.73 of the Board's Rules and Regulations). While a charged party may have an obligation to cooperate, the investigative function remains with the Regional Director. Here, no evidence showed that the Regional Director sought evidence of financial hardship from Applicant.

argues that special circumstances existed in that Applicant failed to provide the Region with evidence supporting its economic basis for the relocation of the Lake City operation.

During proceedings leading to the instant hearing, which included phone conference between the undersigned and the parties, General Counsel contended that its special circumstances argument relied on discussions during December 1977 phone conversations between a Board agent from Region 10 and an attorney for Applicant, Ronald Ingham. General Counsel contended that those conversations demonstrate Applicant's failure to cooperate with the 10-CA-13284-2 investigation.

The evidence offered in support of General Counsel's special circumstances contention was received through stipulation. That stipulation reads:

> During the investigation of the charge in Case Number 10-CA-13284-2, Lion was sent the letters with the charge and amended charge, received as General Counsel's Exhibits 1(o) and 1(q) in the Judge Miller proceeding.
>
> On December 2, 1977, and December 12, 1977, Board Agent Richard Prowell telephoned Ronald Ingham and told him that the Union had filed a Runaway Shop charge. Prowell asked Lion's position. Ingham asked whether Prowell had a copy of the telegram received as Respondent's Exhibit 5 in the Judge Robertson proceeding, sent by Lion's vice president of manufacturing to the Union, stating that the move was temporary.
>
> MR. ROSENTHAL: Excuse me. Isn't that Respondent's Exhibit 45 in the Judge Robertson proceeding?
>
> MR. CARD: I thought I said 45. Forty-five, I'm sorry.

> Ingham offered to provide the telegram. Prowell said that the Union was sending it to him. Ingham iterated that the move was temporary and said that he did not know what else he could offer by way of proof, other than the telephone calls and repeated assurances to the Charging Party that the move was temporary. Lion made no further response to the letters.
>
> No further request was made by General Counsel for evidence, information, access to witnesses or records, nor was any such evidence offered by Lion.

As shown above, the October 23, 1977 telegram (R-45 in the underlying unfair labor practice proceeding) which was delivered to the Union's District Director John Williams reads:

> NOTICE IS HERE WITH EXTENDED TO YOU THAT BECAUSE OF THE WORK STOPPAGE AND OUR CRITICAL NEED TO MANUFACTURE FIRECOATS, LION UNIFORM, JANESVILLE APPAREL DIVISION WILL BEGIN MANUFACTURING FIRECOATS ELSEWHERE ON A TEMPORARY BASIS. WE ARE HOPEFUL THIS SENSELESS WORK STOPPAGE WILL END SO THAT LION UNIFORM CAN RESUME OPERATIONS IN LAKE CITY. FURTHER, CONTINUED UNLAWFUL CONDUCT IN THE FACE OF A COURT RESTRAINING ORDER WILL FORCE US TO EXAMINE THE POSSIBILITY OF A SUIT FOR DAMAGES AGAINST OCAW.

In order to properly assess General Counsel's argument it is essential to consider events as they existed when Board agent Prowell called attorney Ingham during December 1977. At that point only a charge, not a complaint, was outstanding. The charge alleged that Applicant violated Section 8(a)(1), (3), (4), and (5) by

relocating its Lake City operation to Beattyville, Kentucky on October 24, 1977.

There was not, during December 1977, any question of remedy. There was no question which would require Applicant to show as it did through voluminous documents at the unfair labor practice trial, that it would have been financially burdensome to relocate the displaced firemen's clothing production back to Lake City. The question in December 1977 was a simple one. Why did Applicant move the fire clothing production on October 24, 1977?

Mr. Ingham's response to Board Agent Prowell appeared to be complete. The telegram (quoted above) sets forth a specific reason for the relocation. Obviously, General Counsel had the means to determine whether the strike had curtailed the Lake City operations. There was no apparent need for Ingham to supply that information. Obviously, a manufacturing facility looses its ability to fill orders and make a profit when its production is stopped. There was no need for Ingham to supply that information. Otherwise, the October 23 telegram is a self explanatory document. It contained all that any reasonable labor attorney would have though necessary to defend 10-CA-13284-2.

Subsequently, after the January 5, 1978 tentative decision to keep the firemen's clothing production in Beattyville, a question may have arisen as to economic justification. However, in that regard, as shown above, Applicant offered to permit the Union to examine its books. The Union refused.

During numerous settlement discussions and in letters, Applicant told the Region that return of the fire clothing production to Lake City would impose a financial hardship. However, the Region never asked Applicant to present evidence of financial hardship.

Of course, Applicant did not undertake to defend the 10-CA-13284-2 unfair labor practice charge with the same vigor that it ultimately defended the complaint allegations. To do so would have involved a ridiculous waste of money.[11] No intelligent employer would permit the extensive expense inherent in such defense at a time when no sanctions would result and when the charge may have been dismissed without further action. Applicant, like any reasonable employer, was trying to reasonably defend the unfair labor practice charges.

As indicated in stipulation, Applicant never refused a request from the Region for cooperation in the unfair labor practice investigation.

I find no justification for a determination that special circumstances preclude a recovery by Applicant.

Fees:

(A) *The underlying unfair labor practice proceeding*:

The EAJA permits a prevailing party to receive fees and other expenses incurred by it in connection with agency proceedings. The Act provides that the Applicant's claim may be reduced if Applicant unduly and unreasonably protracted the final resolution of the matter in controversy.

No evidence was offered, and I am unaware of any facts which show that Applicant unduly and unreasonably protracted final resolution of the unfair labor practice proceedings. Therefore, I find that the fee award should not be reduced on that basis.

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[11] A requirement that an Applicant must fully defend all charges at the investigative stage without regard to cost, would effectively circumvent the objective of the EAJA which was designed to prevent the government from unfairly enforcing sanctions against small businesses by subjecting those businesses to large litigation and investigative expenses.

The Act permits recovery of reasonable fees, expenses, and costs of studies, reports, etc. Recovery of attorney or agent fees are limited to a rate not to exceed $75 per hour.

The Board's rules and regulations, Section 102.145(c) state:

> (c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the following matters shall be considered:
>
> (1) if the attorney, agent or expert witness is in practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;
>
> (2) the prevailing rate for similar services in the community in which the attorney, agent or expert witness ordinarily performs services;
>
> (3) the time actually spent in the representation of the applicant;
>
> (4) the time reasonably spent in light of the difficulty or complexity of the issues in the adversary adjudicative proceeding;

With the above in mind, I shall examine Applicant's claim from the point of reasonableness.[12]

In accessing reasonableness, I am aware of two significant overriding points:

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[12] Applicant limited its claim for attorney fees to $75 in instances where the actual billing reflected an hourly rate of $75 or more. Evidence which was undisputed by General Counsel, demonstrated that those actual billing rates were customary and reasonable. No contrary evidence was offered to Applicant's proof that actual fees which were shown to be at a rate below $75 per hour, were customary and reasonable. Applicant's proof that its actual billing rates were in accord with the rates in the community, was not contested by General Counsel. General Counsel did not contest Applicant's assertion as to time actually spent except as noted below.

(1) Applicant was aware of the sizable financial burden and production delay potential, which a Board order requiring removal of the firemen's clothing back to Lake City would entail; and

(2) Although its attorneys felt that Applicant had a solid defense to the unfair labor practice allegation regarding the relocation issue, because of the unavailability of discovery in an NLRB proceeding, the attorneys could not be sure that General Counsel's case was as weak as it appeared to them.

I credit Applicant's contention that both the above factors contributed to its decision to fully prepare and defend the unfair labor practice case.

Additionally, I am persuaded that but for the relocation allegation and the consequent remedy sought by General Counsel, the underlying matter would have settled early in 1978. Therefore, I shall not automatically discount claims for fees not directly related to the relocation allegations. I do not adopt General Counsel's contention that Applicant is "only entitled to those fees and expenses attributable to the relocation charge." But for the relocation charge, the underlying matter would have settled and, therefore, all litigation fees after February 1978 would have been avoided.

Nevertheless, I find that Applicant is not entitled to any fees and expenses incurred before complaint issued on the relocation matter on February 9, 1978. General Counsel is obligated to investigate all charges. The General Counsel should not be bound by the "substantial justification" standard prior to complaint issuing. The investigatory stage of an unfair labor practice charge is not part of the adversary proceeding.

I also agree with General Counsel's contention that Applicant should be denied fees associated with handling an unemployment compensation claim. Although Applicant contends those proceedings were necessary for dis-

covery purposes, Applicant was unable to show that but for the discovery aspect, an attorney would not have handled the unemployment compensation hearing. Therefore, I shall deduct $130.75 from Applicant's claim. Nevertheless, the work of attorney Jennifer Cox in digesting the unemployment transcripts did directly relate to the underlying unfair labor practice proceeding. Therefore I shall allow that claim of $1,665.00

I also agree with General Counsel that expert witness fees should be limited to $75 per hour.

As to General Counsel's claim that Applicant was excessive in using three attorneys in the unfair labor practice hearing, I disagree. Unrebutted testimony proved that all three engaged in productive, nonduplicative work during the trial. Keeping in mind the devastating effect a loss would have had on an Applicant's business and the fact that Applicant was not aware of what General Counsel's case entailed, I am unable to find that Applicant's use of three attorneys was excessive.

Moreover, I am unable to approach this case through use of a "lodestar" approach by concluding what would be a reasonable number of hours necessary to litigate this case. This case involved factors other than those found in normal litigation practice, including extensive settlement efforts [13] plus extensive trial efforts which may have been unnecessary in courts where discovery is permitted.

Additionally, there was no evidence which demonstrated that Applicant's use of some fourteen attorneys at various times was unreasonable. The practice of using several attorneys in the same law firm has become widely accepted. General Counsel offered no evidence to support his contention that a client should be able to expect that its task can be handled by one attorney.

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[13] Those settlement efforts resulted in numerous trips and conferences and an additional unfair labor practice hearing.

As mentioned above, I am not persuaded that the use of three attorneys for preparation and trial was unreasonable in this instance. However, I do agree with General Counsel that a certain claim is unreasonable. I find it unreasonable to use all three attorneys in the August 22, 1980 trial preparation of Sydney Burns. Therefore, I shall disallow the claims of Rosenthal and Cox for 7 and 10.5 hours respectively. Denlinger, the chief attorney, claimed 8 hours for that date in preparation of Burns. I shall allow that 8 hour claim.

Contrary to General Counsel's arguments, I am unable to arbitrarily deny claims stemming from intra-office conferences. Those claims appear reasonable in view of the other factors mentioned above. The same is true regarding claims associated with preparing documents for the 1980 unfair labor practice hearing. Those documents were voluminous and as shown above, Applicant could not risk a loss over the relocation issue.

As to travel and meal time, I find that Applicant's practice of charging travel time only when the travel occurred during working hours, thereby depriving the attorney of an opportunity to earn other fees, and the practice of charging for working meals, is reasonable.

I do not find the time Applicant spent on briefs to the Administrative Law Judge to be unreasonable. However, Applicant's claim of 57 hours to submit a substantially similar brief to the Board does appear excessive. I find that 10 hours should be reasonable for preparation of the brief which was submitted to the Board.

Applicant claims fees and expenses associated with the underlying unfair labor practice proceeding in the amount of $104,330.25. In view of my findings herein, I recommend that Applicant be reimbursed fees and expenses for work in the unfair labor practice proceeding in the amount of $96,904.45 which is itemized as follows:

Ronaid G. Ingham—$9,347.50
Dean Denlinger—$26,831.25
Expenses—$5,250.74
Daniel G. Rosenthal—$30,006.25
Jennifer Cox—$18,967.50
Robert Brown—$937.50
Gary Greenburg—$937.50
Edward Mitchell—$206.25
Richard DuRose—$1,231.25
Kathleen Brott—$1,237.50
Howard Thiele, Jr.—$18.75
Peter Tamborski—$26.25
Stephen Butler—$81.25
Robert Papp—$13.75
Barbara James—$105
Allan Gradsky—
Fees (limited to $75 per hour)—$4,575
Expenses (387.46)
Total Fees and expenses—$4,962.46
Hop Bailey—$400

Deductions:

Unemployment compensation hearing: $130.75
47 hours at $75 per hour (brief to Board)—$3,525.50
Total deductions—$3,656.25

(B) *The EAJA Proceedings:*

Applicant claims fees and expenses incurred during the prosecution of this EAJA claim through June 29, 1983,[14] totaling $97,346.07. I find that Applicant should recover fees and expenses incurred during the EAJA proceeding.

In that regard, I find that the EAJA proceedings were not unduly and unreasonably protracted by Applicant.

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[14] Applicant may incur additional fees and expenses as this litigation continues. Therefore, my ruling herein should be adjusted at the conclusion of these proceedings.

As noted above, the February 19, 1982 application for fees and expenses under EAJA was referred to the undersigned Administrative Law Judge on February 23, 1982. On March 26, 1982, the General Counsel filed a motion to dismiss the application. By order dated April 22, 1982, the General Counsel's motion to dismiss was denied.

On May 20, 1982, General Counsel was granted an extension of time until June 8, to file an answer to the application. General Counsel's answer was received on June 8, 1982.

On July 9, 1982, Applicant's reply to the answer of General Counsel was received.

On July 14, 1982, a conference phone call was initiated by the undersigned including Counsels for General Counsel and Applicant. During that conference General Counsel requested an additional verified statement from Applicant regarding the issue of Applicant's eligibility under the EAJA. The undersigned suggested that rather than relying on a statement from Applicant, General Counsel could avoid additional delay by examining Applicant's books and records. Applicant agreed to permit General Counsel to examine its books and records. However, General Counsel insisted that it was entitled to an additional verified statement from Applicant. Applicant agreed to supply the requested statement. General Counsel was asked by the undersigned to disclose its basis for its substantial justification claim to the extent that claim relied on evidence not in the unfair labor practice proceeding record. General Counsel replied that he would not disclose contents of investigative files. However, after further discussion General Counsel agreed to examine the investigative files and consider possible stipulations of fact. Undersigned reminded the parties that it was the Board's practice to seek to avoid a hearing in EAJA proceedings if possible. The undersigned asked the attorneys to cooperate toward that end and pointed out that

the parties could agree on discovery devices such as depositions if those devices would assist in resolving issues without a hearing.

During the September 16, 1982, conference phone call involving Counsel for General Counsel and Applicant, and the undersigned, Applicant advised that the additional financial statement requested by General Counsel would be submitted to General Counsel during the following week.

By letter dated September 20, 1982, Applicant supplied additional information pursuant to General Counsel's request.

During an October 1, 1982, phone conversation involving all the parties and the undersigned, Applicant advised the General Counsel had asked it to reply to questions regarding employee count and to supply additional information. Additionally, General Counsel recently requested the underlying records from Applicant. Applicant indicated General Counsel's request would be burdensome. However, Applicant agreed to comply with the General Counsel's request. Applicant asked if General Counsel would cooperate in discovery of basis for General Counsel's claim of "special circumstances." [15] The undersigned pointed out that the Board has permitted the use of discovery in certain situations and that its use here may assist in avoiding a hearing. Applicant agreed to discuss the matter with General Counsel in the upcoming week.

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[15] General Counsel contended that Applicant should be barred from recovery of fees and expenses due to special circumstances. As shown above in this decision, General Counsel's claim was based on an alleged refusal of Applicant to cooperate in the investigation of charge number 10-CA-13284-2. General Counsel contended that its special circumstances claim was based on the contents of phone conversations during December 1977 between Board Agent Prowell and Applicant attorney Ingham. Applicant's EAJA attorney asked if she could examine the Regional Office's telephone logs of those phone conversations.

The parties were advised that in accord with our discussions and my efforts to resolve the issues without a hearing, I would issue an Order directing the filing of trial briefs. On that date, October 1, the undersigned issued an Order directing the parties to file trial briefs outlining all issues of fact and law.

During an October 16, 1982, conference phone call, Counsel for General Counsel advised that he had been authorized to employ a certified public accountant to examine Applicant's books regarding the eligibility issue. In light of General Counsel's authority to use a CPA and the necessity of additional time for the CPA to conclude his work, the date for receipt of pretrial briefs was extended to January 17. Applicant agreed to cooperate with the CPA employed by General Counsel provided Applicant is given a copy of the CPA's report to the General Counsel.

By telegram dated October 15, 1982, Applicant moved to preclude General Counsel from introducing evidence supporting its special circumstances claim. Applicant based its motion on an assertion that General Counsel had refused to cooperate in providing information regarding its special circumstances allegation. By letter to the undersigned dated October 19, 1983, Counsel for General Counsel stated, *inter alia*, "Although not technically covered by Section 102.147(f) and (h), we will provide additional information concerning our 'special circumstances' contention."

By October 20, 1982, Order, Applicant's motion to preclude General Counsel from introducing evidence was denied. The parties were directed to conclude all discovery before submitting pretrial briefs.

Despite the fact that the only matter sought by Applicant involved notes of two alleged December 1977 phone conversations between Board Agent Prowell and an attorney for Applicant, General Counsel filed with the

Board on November 3, 1982, a request for special permission to appeal the undersigned's October 20, 1982, Order. In its request General Counsel stated among other things:

> 3. As noted *supra* Judge Robertson's original Order appears to contemplate broad pretrial discovery. Indeed, during the October 1, conference call with the parties, Judge Robertson indicated a willingness to permit interrogatories and/or depositions of Board Agents should Applicant so choose. Concedely, his Order of October 20 may be somewhat narrower. Thus, in that Order he compels pretrial discovery of 'all materials which would be subject to production under Section 102.118(b)(1), during the hearing.' However, we note that the prior broad Order has never been rescinded. Accordingly, we believe that we are now subject to a broad pre-trial discovery Order. At the very least, we are subject to a somewhat narrower pretrial discovery Order.

By Board Order dated November 15, 1982, General Counsel's special request was granted and all prehearing discovery was denied.

Pretrial briefs were received from Applicant and General Counsel on January 17, 1983.

During a January 26, 1983, phone conference, the parties were directed to consult and jointly submit an Order Directing Hearing which was to specify outstanding factual and legal issues and the nature of the planned proof.

During a March 1, 1983, conference, Applicant advised it had not received the report from General Counsel's CPA and that it needed that report before it could meet and discuss the proposed Trial Order. A tentative date

for the parties to meet and draft the Trial Order was set for March 21, 1983.

On March 17, 1983, General Counsel initiated a conference call. General Counsel orally requested a continuance of the scheduled March 21 meeting on the grounds that the report from General Counsel's CPA was not ready. A new date was suggested, but the parties were unable to agree. Counsel for General Counsel then mentioned that he had not cleared with his people the format of the pretrial Order proposed by the undersigned in the January 26, 1983, conference. Counsel for General Counsel was thereupon directed to inform the undersigned and Applicant no later than March 18, 1983, whether General Counsel would agree to meet with Applicant and draft a hearing Order as earlier proposed.

In a March 18, 1983, conference call, Counsel for General Counsel advised that General Counsel would not agree to a hearing Order as proposed. Counsel for General Counsel also advised that he would not submit to Applicant, logs of the December phone conversations between Board Agent Prowell and Applicant's attorney Ingham, before hearing in this matter and only then preparatory to cross-examination if Board Agent Prowell was called as a witness. Counsel for General Counsel also stated that he will reserve a decision as to whether he will submit a copy of the report from General Counsel's CPA until after he has had an opportunity to examine the CPA report. Applicant reminded Counsel for General Counsel that he had originally agreed to supply Applicant with copies of the CPA report as a condition precedent to Applicant permitting the CPA to examine its books and records.

In an April 5, 1983, phone conference, Applicant requested continuance of the hearing on grounds that it had not received a copy of the CPA report from General Counsel. General Counsel agreed to authorize the Re-

gional Office in Cincinnati to release the CPA report to Applicant on this date.

During conferences on April 6 and April 8, 1983, Applicant's unopposed request to continue opening the hearing to May 16, 1983, was granted on the grounds that Applicant had insufficient time to prepare following receipt of General Counsel's CPA report.

In view of the above and my knowledge of these proceedings, I am persuaded that Applicant has cooperated fully in efforts to expedite resolution at a minimum cost. General Counsel, on the other hand, appeared to persist in exaggerated positions, oftentimes on overly technical points.

Therefore, I find that Applicant should not be precluded from recovering fees and expenses associated with prosecution of this Equal Access to Justice Act claim.

General Counsel contends that fees and expenses associated with the EAJA prosecution should be awarded only where General Counsel has acted unreasonably.

During the instant proceedings, General Counsel resisted my efforts to have the parties discuss settlement. As noted above, Counsel for General Counsel filed a request for special permission to appeal to the Board which misstated and exaggerated the substance and background of my prior Orders. Thereafter, despite its October 19, 1982, written assurance that it would provide to Applicant additional information regarding its special circumstances contention, General Counsel did not do so until after the hearing in this matter. Moreover, even though I asked General Counsel to consider a stipulation regarding facts behind its special circumstances contention during our July 14, 1982, phone conference, General Counsel made no such proposal until the hearing.

General Counsel's actions in failing to cooperate through production of the telephone logs of the December,

1977 phone calls between Prowell and Ingham or, alternatively, through proposal of stipulations of the substance of those phone conversations, and its refusal on March 18, 1983, to agree to meet with Applicant to finally draft a trial order which may have illustrated that a hearing was unnecessary, resulted in the holding of an EAJA hearing which may have been unnecessary.

General Counsel's actions were unreasonable and those actions contributed to protracting these EAJA proceedings.

As to General Counsel's contention that Applicant's claim for fees and expenses during the EAJA proceeding are excessive, I disagree. The application required immediate action in view of the requirement that it must be filed within 30 days after the Board's underlying Order. The application herein was complete and well prepared. I do not find a claim for 89.5 hours for preparation of the application to be excessive. Neither do I find the claims for travel, copying, and miscellaneous matters to be excessive as alleged by General Counsel.

I recommend that Applicant be reimbursed fees and expenses for work in these EAJA proceedings through June 29, 1983, in the amount of $90,564.65 [16] which is itemized as follows:

Expenses	$ 8,875.34
Hope M. Frye	42,935.00
Daniel Rosenthal	15,393.75
Dean Denlinger	7,050.00
Richard DuRose	450.00
Howard Thiele, Jr.	150.00
Stephen Butler	75.00
Betty Siegfield (paralegal)	17.50
B. L. Smith (investigator)	17.50

[16] The claim submitted regarding Peat, Marwick, Mitchell & Co. DR., was not itemized on an hourly basis. No allowance is granted on that basis subject to that claim being resubmitted during final adjustment, at the conclusion of these proceedings.

Thomas Jackson (investigator)	35.00
Rippe & Kingston (CPA)	
Joseph Rippe	
(claim adj. to $75/hr.)	4,503.75
Laura Brunner	1,360.80
Paraprofessionals	67.50
Secretaries ($92.85 & $40.08)	132.93
Out of pocket expenses	418.08
Roger Makley (plus expenses of $125)	2,625.00
Price Waterhouse	
(claim adj. to $75.hr.)	600.00
John Fischer	96.25
Peter Tamborski	45.00
Ronald Ingham	300.00
Bari Gaston (paralegal)	691.25
Pam Jenning (paralegal)	2,756.25
Debbie Martin (paralegal)	1,242.50
Cynthia Harper (paralegal)	288.75
Todd Carven (investigator)	17.50
Jim Prichard (investigator)	420.00

Dated at Washington, DC September 13, 1983.

/s/ J. Pargen Robertson
J. PARGEN ROBERTSON
Administrative Law Judge

No. 90-387

In the Supreme Court of the United States

OCTOBER TERM, 1990

LION UNIFORM, INC.,
JANESVILLE APPAREL DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in denying an award of attorney's fees under Section 203(a)(1) of the Equal Access to Justice Act (5 U.S.C. 504(a)(1)), the National Labor Relations Board properly accorded *de novo* review to the determination of an administrative law judge that the position of the Board's General Counsel was not substantially justified.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 905 F.2d 120. The decision and order of the National Labor Relations Board (Pet. App. 12a-60a), including the recommended decision and order of the administrative law judge (Pet. App. 61a-101a), are reported at 285 N.L.R.B. 249. The Board's orders in the underlying unfair practice proceeding are reported at 259 N.L.R.B. 1141 and 247 N.L.R.B. 992.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1990. The petition for a writ of certiorari was filed on September 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactured "fire coats" for firefighters at its plant in Lake City, Tennessee. In the spring of 1977, the Oil, Chemical and Atomic Workers International Union ("the Union") began an organizing campaign at the Lake City plant. The Union won the ensuing Board election held on July 14, 1977, and on October 6, 1977, was certified as the collective bargaining representative of petitioner's production, maintenance and plant clerical employees. 259 N.L.R.B. 1141, 1141-1142 (1982).

On October 12, 1977, the employees went on strike. On October 24, during the strike, petitioner moved the fire coat production line from its Lake City plant to its Beattyville, Kentucky location. 259 N.L.R.B. at 1142. On January 5, 1978, petiioner notified the Union by letter that it had tentatively decided to make the relocation to Beattyville permanent. In that letter it offered to negotiate with the Union over this decision. Petitioner also indicated that it intended to resume production at Lake City with another product line once the strike was over. *Id.* at 1146; Pet. App. 21a-23a.

The Union filed unfair labor practice charges with the Board's Regional Office alleging that petitioner committed numerous violations of Section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1), during the election campaign, including threats by petitioner's owner and other man-

agement representatives to close the Lake City facility, to discharge the employees, and to cancel the plans for expansion and improvement of the Lake City facility.[1] After the election, the Union filed additional charges alleging that petitioner had unilaterally changed the employees' working conditions in violation of Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by its October 24 move of the firemen's clothing line from Lake City to Beattyville, and the subsequent abolition of the employees' jobs in Lake City. 247 N.L.R.B. 992 (1980). The Board's General Counsel issued unfair labor practice complaints on all of these charges and they were consolidated for hearing.

At the outset of the hearing, petitioner offered to admit all the unfair labor practice allegations, including the allegation that the removal of the fire coat line from Lake City was motivated by its union animus, if the Board's order would permit it to reopen its Lake City facility with a product line of knit shirts rather than fire coats. The General Counsel and the Union opposed the settlement, on the basis that only the return of the fire coat line would fully remedy the unfair labor practices committed. 247 N.L.R.B. at 992-993.

The Board, reversing the decision of the administrative law judge (ALJ), refused to accept the settlement. The Board found that the settlement would not restore the *status quo ante* because the seasonal

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[1] Petitioner entered into an informal settlement agreement with the Board's General Counsel resolving these charges but the agreement was set aside after the Union filed additional unfair labor practice charges. 247 N.L.R.B. 992 (1972).

production of knit shirts would not provide the job security produced by the steady demand for fire coats. 247 N.L.R.B. at 993-994.

Thereafter, a hearing was held on the unfair labor practice complaints. The ALJ, whose decision was upheld by the Board with modifications immaterial here, found that during the election campaign petitioner had made numerous threats of retaliation against employees for engaging in union activity, made promises of benefits if employees rejected the Union, and solicited employees to influence other employees to vote against the Union, all in violation of Section 8(a)(1) of the Act. Pet. App. 24a; 259 N.L.R.B. at 1142-1143. The ALJ further found that petitioner had violated Section 8(a)(1) and (5) of the Act by unilaterally informing its employees that work rules would be more strictly enforced and that the employees' privileges of placing food and drink orders through outside restaurants were rescinded, at a time when the Union was the employees' collective bargaining representative. Pet. App. 24a; 259 N.L.R.B. at 1144.

However, the ALJ concluded that petitioner had not violated Section 8(a)(3) or (5) of the Act when it moved the fire coat line from Lake City on October 24, 1977. The ALJ found that petitioner had proven that the move was temporary, was precipitated by the strike and was economically motivated.[2] Pet. App. 24a; 249 N.L.R.B. at 1145-1146. Finally, the ALJ held that petitioner did not violate Section

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[2] In reaching this conclusion, the ALJ was "bothered by evidence which tends to show that [petitioner] was motivated by its employees' union activities." 259 N.L.R.B. at 1145. The ALJ referred specifically to petitioner's owner's threats to employees that petitioner would close the plant and cancel expansion plans because of the employees' union activities. *Ibid.*

8(a)(5) of the Act with regard to its duty to negotiate regarding the return of the fire coat production line to Lake City in January 1978. Pet. App. 24a; 259 N.L.R.B. at 1146-1147.

2. Petitioner filed an application with the Board under the Equal Access to Justice Act, 5 U.S.C. 504 (EAJA), to recover attorney's fees and expenses. The Board referred the application to an ALJ. The ALJ found that petitioner met the eligibility requirements of EAJA (Pet. App. 62a-70a), that the General Counsel was not substantially justified in alleging that petitioner's action in relocating its fire coat line from Lake City to Beattyville was unlawful (*id.* at 72a-78a), that the General Counsel was not substantially justified in refusing a settlement that did not include the return of the fire coat line to Lake City (*id.* at 78a-84a), and that no special circumstances made an award of EAJA fees unjust (*id.* at 84a-88a). He recommended that petitioner be awarded fees and expenses—totalling $90,564.65—incurred in the underlying unfair labor practice proceeding and in the EAJA proceeding. Pet. App. 92a, 100a.

The Board, Chairman Dotson dissenting, reversed the ALJ's award of fees and dismissed petitioner's EAJA application. Pet. App. 39a-40a. Initially, the Board determined that it has jurisdiction to review an ALJ's EAJA decision based on the 1985 amendment to 5 U.S.C. 504(a)(3) providing that it is the *agency* that makes the final decision on EAJA applications. Pet. App. 14a.

The Board then decided that the General Counsel was substantially justified in issuing the complaint concerning the relocation of the fire coat production line and in pursuing that allegation throughout the unfair labor practice proceeding. Pet. App. 20a-21a.

The Board disagreed with the ALJ's finding (*id.* at 73a) that there was "no evidence" that the October 1977 relocation was unlawfully motivated or that petitioner failed to bargain as to this move. *Id.* at 25a, 35a.[3] The Board further held that the General Counsel was substantially justified in rejecting petitioner's settlement offers, which involved less than full reinstatement.[4] *Id.* at 27a. Finally, the Board held that the General Counsel was substantially justified in litigating the case through the close of the hearing and in submitting a posthearing brief to the ALJ. *Id.* at 37a-38a. Although the Board did not find the General Counsel's exceptions persuasive, it concluded that the General Counsel was substantially justified in filing them. *Id.* at 39a.[5]

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[3] The Board noted, *inter alia*, petitioner's pre-election threats to close the plant and cancel the expansion plans, and the timing of the move, 2 weeks after the strike. Moreover, the Board found that "no real evidence had been presented by [petitioner] to counter balance the apparent discriminatory motive for the move." Pet. App. 25a-26a.

[4] The Board noted that the Board had rejected the unilateral settlement proposal and that the earlier settlement of Section 8(a)(1) conduct had been withdrawn by the Regional Director. Pet. App. 29a.

[5] The Board relied on the ALJ's findings of petitioner's union animus and on petitioner's contradictory statements respecting its intentions concerning the Lake City and Beattyville locations. Pet. App. 38a-39a.

The Board agreed with the ALJ that the General Counsel was not substantially justified in including an allegation that petitioner violated Section 8(a)(5) of the Act by its action on January 5, 1978, in tenatively making the move permanent. However, it found that an award for EAJA fees was not warranted because this allegation was not a "significant and discrete" substantive part of the proceeding. Pet. App. 36a-37a.

3. The court of appeals affirmed the Board's order denying EAJA fees and expenses. Pet. App. 11a.

The court first concluded that the Board had properly applied a *de novo* standard of review to the ALJ's decision. The court rejected petitioner's contention that this case is controlled by *Pierce* v. *Underwood*, 487 U.S. 552 (1988), and that therefore the Board is required to use a deferential abuse of discretion standard when reviewing an ALJ's EAJA decision. As the court explained, "[u]nlike an appellate court, the Board's normal function requires it to examine the complete record of a proceeding and make *de novo* findings." Pet. App. 7a. The court added that an abuse of discretion standard for Board review of ALJ EAJA determinations would be incompatible with the subsequent substantial evidence standard of review of Board determinations by the reviewing court: "[W]here the EAJA litigation begins before an agency, with appeals contemplated to the courts, a highly deferential review by the Board, followed by a less deferential review by the courts, makes little sense. In the absence of more specific legislative direction, we must assume that the more logical scheme applies—that the standard of deference is heightened as the appeal process progresses—*de novo* review at the agency level, and substantial evidence review before the courts." *Id.* at 8a-9a.

The court then found that there was substantial evidence to support the Board's conclusion that the General Counsel's prosecution of the relocation allegation and its refusal to accept petitioner's settlement proposals were substantially justified. Pet. App. 9a-11a.

ARGUMENT

The decision of the court of appeals is correct. Because, as petitioner concedes, this "is the first case to address" the issue posed (Pet. 16), it does not conflict with the decision of any other court. Further review is therefore not warranted.

1. Section 203(a)(1) of EAJA, 5 U.S.C. 504 (a)(1), provides for an award of attorney's fees to a party prevailing in an "adversary adjudication" before an agency, unless it is shown that the government's position was "substantially justified" or that special circumstances make an award unjust. That Section further provides that the "adjudicative officer of the agency" shall determine whether the position of the agency was substantially justified or there were special circumstances.[6] Relying on the language "adjudicative officer," which is defined as the "deciding official * * * who presided at the adversary adjudication" (5 U.S.C. 504(b)(1)(D)), petitioner contends (Pet. 9-10) that EAJA precludes *de novo* review by the Board of the ALJ's determination on the issue of substantial justification. However, the last sentence of EAJA, 5 U.S.C. 504(a)(3), which was added in 1985, makes clear that, notwithstanding the role of the adjudicative officer, "[t]he decision of the *agency* on the application for fees and other expenses shall be the final administrative decision under this section" (emphasis added). And, as we show below, the history of this amendment establishes that Congress, in providing for agency review of adjudicative officers' EAJA determinations, con-

[6] The adjudicative officer also is empowered to determine whether a fee award may be denied or reduced because the party has unduly or unreasonably protracted the proceeding. 5 U.S.C. 504(a)(3).

templated that the agency would apply the same standard of review that it applied in adjudications under the Administrative Procedure Act (APA), 5 U.S.C. 551.[7]

a. EAJA, as it was first enacted in 1980, made no reference to agency review of adjudicative officers' decisions.[8] The draft model rules prepared by the Administrative Conference of the United States (ACUS) to assist the agencies in formulating rules[9] provided, in pertinent part (Sec. 0.409(b)), that the adjudicative officer's decision was reviewable by the agency under the standard "ordinarily applied to [recommended or] initial decisions, except that an adjudicative officer's determination" on the issues whether the agency's position was substantially justified or special circumstances make an award unjust "will be reversible only for abuse of discretion." 46 Fed. Reg. 15,895, 15,905 (1981); see also *id.* at 15,900-15,901.

After comment from several agencies, including the Board, the ACUS revised the pertinent rule (Sec. 0.308) to omit any special standard for agency re-

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[7] The APA provides, 5 U.S.C. 557(b), that "on appeal from or review of the initial decision [of the presiding employee], the agency has all the powers which it would have in making the initial decision * * *."

[8] The only reference to the adjudicative officer's decision, other than those previously noted, states that the decision "shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor." 5 U.S.C. 504 (a)(3).

[9] Administrative agencies are required by EAJA to "establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses" through the adoption of rules. 5 U.S.C. 504(c)(1).

view of an adjudicative officer's determinations. 46 Fed. Reg. 32,912, 32,915 (1981). The ACUS explained that it agreed "with those agencies that believe that the standard of review" in the Administrative Procedure Act, 5 U.S.C. 557, "applies to decisions on applications for attorney fees." While acknowledging that EAJA could be interpreted to permit an "abuse of discretion" standard for review of an adjudicative officer's decision on the issues of substantial justification or special circumstances, the ACUS found "no clear indication that Congress intended to adopt such an unusual and potentially impractical procedure." Instead, "we believe that Congress mentioned the adjudicative officer to insure that the initial ruling on an application would be made by someone with direct knowledge of the underlying proceeding." The ACUS concluded that, "[i]f Congress meant to depart so substantially from customary agency practice in adjudications under the Administrative Procedure Act, we believe it would have done so explicitly." 46 Fed. Reg. 32,900, 32,910 (1981).

Thereafter, the Board published its own EAJA rules based upon the ACUS model rules. 29 C.F.R. 102.143 *et seq.* The Board's rules provide that the rules governing EAJA cases will be patterned after the rules covering the Board's unfair labor practice cases. 29 C.F.R. 102.154. In unfair labor practice cases, the Board, while giving deference to the ALJ's credibility findings, gives the ALJ's other findings *de novo review. Standard Drywall Products, Inc.*, 91 N.L.R.B. 544, 545 (1950); see also *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 492-496 (1951).

b. In 1984, Congress passed H.R. 5479 (98th Cong., 2d Sess.), which would have extended, made permanent, and amended EAJA, but it was vetoed

by the President. See H.R. Rep. No. 120, 99th Cong., 1st Sess. 6 (1985). H.R. 5479 would have added a final sentence to Section 504(a)(1) making explicit that "[t]he decision of the adjudicative officer on the application for fees and other expenses shall be the final administrative decision under this section." H.R. Rep. No. 992, 98th Cong., 2d Sess. 20 (1984); and see *Equal Access to Justice Act Amendments: Hearing on H.R. 5059 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 139 (1984). The House Report on H.R. 5479 explained that "[t]here is a potential conflict of interest when an agency is asked to review the propriety of its own actions particularly when an award may be taken from its own budget. This distinguishing feature, in the Committee's view, justifies a departure from the Administrative Procedure Act." H.R. Rep. No. 992, *supra*, at 9. This provision would have reversed the prior ACUS interpretation that the adjudicative officer's EAJA determinations were reviewable by the agency under the customary APA standard of review, and would have made such determinations directly reviewable in the courts.

However, H.R. 5479 did not become law, and, when EAJA was amended the following year, the ACUS view was specifically adopted by Congress. The bill (H.R. 2223) that was introduced in the 99th Congress to address the concerns of the Administration in vetoing the earlier bill added, as a "clarifying amendment," the following final sentence to Section 504(a)(3), which was ultimately enacted: "The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section." See

Equal Access to Justice Act Amendments: Hearings on H.R. 2223[10] *Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 3 (1985) [hereinafter *Hearings on H.R. 2223*].

Contrary to petitioner's contention (Pet. 14-15), the legislative history makes clear that this amendment was addressed not only to whether the agency had authority to review the decision of the adjudicative officer, but also to the agency's standard for review of that decision. The issue as framed in the hearings was whether a standard other than the normal APA standard of review should apply to agency review of Administrative Law Judges' EAJA fee determinations. Both the Administration and the Chairman of the ACUS took the position that the normal APA standard of review should apply. Thus, in supporting the new clarifying amendment, Carolyn Kuhl, Deputy Assistant Attorney General, Civil Division, Department of Justice, testified that there "was no reason to single out this area for different treatment [than other decisions by administrative law judges subject to agency review]." *Hearings on H.R. 2223*, *supra*, at 15.

Similarly, in a letter to the subcommittee, Loren Smith, Chairman of the ACUS, wrote that "[e]limination of agency review of adjudicative officers' decisions represents a significant departure from the orderly patterns of agency decisionmaking reflected in the Administrative Procedure Act." *Hearings on H.R. 2223*, *supra*, at 73. Chairman Smith described that decisionmaking in the following terms (*ibid.*):

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[10] H.R. 2223 was a forerunner of H.R. 2378, 99th Cong., 1st Sess. (1985), which was enacted into law. See H.R. Rep. No. 120, *supra*, at 6.

> Under the APA, it is the responsibility of Presidentially-appointed, politically accountable agency heads to make important decisions, in most adjudications as well as in other matters. The role of the administrative law judge is to prepare an initial or recommended decision so that the agency will have the benefit of the views of the person who actually heard the evidence. The agency is generally free to reach different conclusions as to either the facts or the law of the case, bringing the expertise and judgment of the agency head (or members) to bear on the record. In addition to assigning the ultimate responsibility for agency decisions where it belongs, with senior appointed officials, agency review provides a crucially important opportunity to ensure consistency in administrative decisions and correct legal and technical errors.

Chairman Smith added (*id.* at 74) that:

> elimination of agency review would produce the anomalous result that an adjudicative officer who does not have the final say on substantive issues in the case will nevertheless have the final say on whether the position of the agency as litigator in that case was substantially justified. An ALJ whose decision has been reversed or substantially modified may have great difficulty in reaching a correct decision on substantial justification based on the agency head's ruling in the case. Consider, for example, the likelihood that an adjudicative officer who found in favor of the agency but was reversed on review will determine that the agency's position was not substantially justified. To do so, the officer would have to cast his or her own initial decision in the case in a very negative light.

Explaining the basis for the amendment to Section 504(a)(3), the House Report on H.R. 2378 stated that the amendment "follows the view adopted by the Administrative Conference." H.R. Rep. No. 120, *supra*, at 14. This statement, read in the light of the foregoing history, makes plain that Congress intended that agencies could review the EAJA determinations of adjudicative officers and that, in doing so, they would apply the normal APA standard of review.[11]

2. Petitioner's reliance (Pet. 10-11) on *Pierce* v. *Underwood*, *supra*, is misplaced. In *Pierce*, this Court held that under 28 U.S.C. 2412(d)—the EAJA section providing for attorney's fees to prevailing litigants in court proceedings—the court of appeals correctly applied an abuse of discretion, rather than a *de novo*, standard of review to the district court's determination that the government was not substantially justified in that case. 487 U.S. at 563. Petitioner argues that the parallel between Section 2412 and Section 504 suggests that the Board must apply an abuse of discretion standard to the ALJ's determination of substantial justification. There is no merit to that contention.

As the court of appeals correctly noted (Pet. App. 7a), "[t]he relationship between a court of appeals and a district court differs substantially from the one existing between an A.L.J. and the Board." Thus, the Board, operating under the APA reviewing standard, normally is free to make *de novo* find-

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[11] Petitioner's reliance (Pet. 10) on Congressman Railback's 1980 expression of preference for ALJ responsibility for determining EAJA awards simply ignores the subsequent clarifying amendment in 1985, which makes explicit that that view was not adopted by Congress.

ings. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 492 (1951), and Administrative Procedure Act, 5 U.S.C. 557. No similar considerations applied to the normal reviewing authority of the court of appeals on the issue presented in *Pierce* (see 487 U.S. at 558).

Moreover, if any parallel can be drawn between the situation in *Pierce* and the situation here, it is the district court and the Board that are analogous, not the district court and the administrative law judge. As the Court noted in *Pierce* (487 U.S. at 559), 5 U.S.C. 504(c)(2) "specifies that the *agency's* decision [as to substantial justification] may be reversed only if a reviewing court 'finds that the failure to make an award * * * was unsupported by substantial evidence' " (emphasis added).[12] The Court relied on that provision in support of its conclusion that courts of appeals should give deferential review to decisions of district courts, expressing "doubt that it was the intent of this interlocking scheme that a court of appeals would accord more deference to an agency's determination that its own position was substantially justified than to such a determination by a federal district court." *Ibid.* Similarly, here, as the court of appeals correctly noted (Pet. App. 8a), petitioner's position "makes little sense," because it would result in the Board's according more deference to the ALJs determination than the court of appeals would accord to the Board's final decision.

Petitioner acknowledges (Pet. 13) that *de novo* review before the agency followed by substantial evi-

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[12] This provision was added in 1985. Previously, there was only a discretionary right of review in the court of appeals under an abuse of discretion standard. See H.R. Rep. 120, *supra*, at 16, 24-25.

dence review by the courts may be " 'more logical' " and "is the typical pattern." Nevertheless, petitioner argues, Congress was free not to make that "choice." That is true. But, as shown above, petitioner's argument that Congress in fact did not make the more logical and traditional choice simply ignores the effect of the 1985 amendments to EAJA.[13]

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[13] Petitioner's reliance (Pet. 10) on the congressional concern that in an EAJA case an agency should not pass judgment on whether its own action has been proper has little relevance for Board proceedings. Under Section 3(d) of the NLRA, 29 U.S.C. 153(d), the General Counsel is an independent prosecutor, whose determination to issue a complaint is not subject to review, either by the Board or by the courts. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975). The Board is the adjudicatory branch of the Agency, which is the ultimate arbiter of the merits of the complaint issued by the General Counsel. The EAJA case arises only after the Board has ruled in favor of the applicant on the merits of the unfair labor practice complaint. In that context, the Board does not review its own actions; rather it must assess the reasonableness of the actions of the separate and independent General Counsel. Moreover, as the Chairman of ACUS pointed out, p. 13, *supra*, in any case where the Board has overturned the ALJ's finding of a violation, it is the ALJ, not the Board, who would necessarily engage in self-judgment in passing on a subsequent EAJA application.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 90-387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

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Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

We explained in our petition (at 9-11) that Congress, in enacting the EAJA in 1980, deliberately chose to establish the presumptively independent adjudicative officer, not the agency itself, as the primary arbiter on attorney's fee awards in administrative proceedings. This decision was motivated by the concern that agencies would be institutionally reluctant to admit a mistake in bringing a case in the first instance. Congress's choice is unequivocally expressed on the face of the statute, which provides that an agency "shall award" fees to a prevailing party "unless the adjudicative officer of the agency finds that

the position of the agency was substantially justified." 5 U.S.C. § 504(a)(1). That language is unique in the United States Code for the explicitness with which it directs that a particular administrative task be performed by the adjudicative officer, rather than by the agency. Moreover, the statutory language closely parallels the language elsewhere in the EAJA (28 U.S.C. § 2412(d)(1)(A)) that established the district courts as the primary arbiters on attorney's fee applications in judicial proceedings, subject to a deferential standard of review. *See Pierce v. Underwood*, 487 U.S. 552, 559 (1988).

The government does not directly take issue with these propositions. Instead, it dismisses the original language and history of the statute as irrelevant and rests its defense of the decision below entirely upon the submission that a one-sentence 1985 amendment empowers the agency to conduct a *de novo* review of the adjudicative officer's initial determination, thereby making the agency itself the primary arbiter.[1] That submission, in turn, rests not on the text of the amendment, but rather upon a fragment of a single

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[1] Although it sees no need to discuss the text or background of the original 1980 legislation, the government does not appear to contend that Congress in 1985 actually altered the statutory allocation of responsibility for ruling on attorney's fees in administrative adjudications. Rather, the government repeatedly characterizes the 1985 addition as a "clarifying amendment" (*see* Br. in Opp. 11, 12, 14 n.11). Thus, the government maintains that, from its inception in 1980, Section 504 established the agency as the primary arbiter on fee applications—a contention that is completely untenable on the face of the statute and, indeed, represents a rule that Congress specifically rejected in its deliberations in 1980. *See* Pet. 10.

sentence in the House Report accompanying the 1985 amendment.

The government's contention is flawed in two major respects. First, it exalts letters submitted to Congress and other legislative history materials above the text of the statute, which continues to assign primary responsibility for ruling on fee applications to the adjudicative officer. Second, the government seriously misconstrues the legislative history of the 1985 amendment, which in fact gives no indication that Congress ever intended to confer on agencies the power to review *de novo* the fee awards made by adjudicative officers.

1. The 1985 amendment added a sentence stating that "[t]he decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section." 5 U.S.C. § 504(a)(3). By its terms, this provision deals only with whether the adjudicative officer's determination is final; it suggests nothing about the standard under which that determination should be reviewed. Indeed, the 1985 amendment leaves intact—and controlling—the key phrase in Section 504(a)(1) that explicitly confers decisional authority on the adjudicative officer and thus negates the contention that the agency is free to substitute its judgment *de novo* for that of the trier of fact.

The government offers no explanation of how its theory can be squared with the statutory text. In effect, it reads the statute as if Section 504(a)(1) stated that a fee award should be made "unless the *agency* finds that the position of the agency was substantially justified." Congress could have drafted the statute that way, but it did not. To the contrary, it

specifically considered and rejected the language that the government seeks to read into the statute (*see* Pet. 10); it deliberately chose instead to place in the hands of the adjudicative officer the primary authority for ruling on fee applications. The decision below represents a substantial, and totally unjustified, revision of the statute actually enacted by Congress.

2. In any event, the legislative history of the 1985 amendment lends no support to the government's effort to rewrite Section 504. Subsequent to 1980, a dispute arose over whether the statute provided for some form of agency review of the adjudicative officer's ruling on fees or, alternatively, whether it made that ruling final and directly subject to judicial review without any agency review at all. As the government notes (Br. in Opp. 10-11), legislation was passed in 1984 that would have resolved this dispute in favor of making the adjudicative officer's decision final, but that legislation was vetoed by the President.

When Congress revisited the issue in 1985 and reached a different conclusion, it again focused on whether the adjudicative officer's decision should be final or subject to *some* agency review. There is not a shred of evidence to support the government's assertion (Br. in Opp. 12) that "[t]he issue as framed in the hearings was whether a standard other than the normal APA standard of review should apply." To the contrary, all of the testimony before Congress, including the material cited by the government, addressed only the question whether there should be agency review at all, not the appropriate standard.

In particular, the letters from Loren Smith, the Chairman of the Administrative Conference, upon which the government so heavily relies (*see* Br. in

Opp. 12-13), repeatedly state that their purpose is to oppose "the *elimination* of agency review of fee determinations by administrative law judges" (a reference to the legislation that had been vetoed in 1984). *Equal Access to Justice Act Amendments: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 72 (1985) (emphasis added). *See also id.* at 73, 74. In the course of a background discussion of general agency procedures one of the letters alludes to the standard of review applied by agencies on the merits, but the letters clearly do not purport to address what standard of review should be applied on fee applications if Congress were to agree to retreat from its 1984 position that the adjudicative officer's decision should be final. All of the specific objections raised in the letters to the *elimination* of agency review are satisfied by providing some form of review, regardless of the standard. Thus, the government's assertion that these letters indicate that Congress "contemplated" (Br. in Opp. 8-9) and deliberately adopted a *de novo* standard of agency review under Section 504 is fanciful.

The full context of the sentence fragment from the House Report relied upon by the government further confirms that Congress did not intend to establish *de novo* review when it made clear that the adjudicative officer's decision would not be final. The House Report states (H.R. Rep. No. 120, 99th Cong., 1st Sess. 14 (1985)):

> This provision explicitly adopts the view that the agency makes the final decision in the award of fees in administrative proceedings under section

> 504. This follows the view adopted by the Administrative Conference and recognizes the fact that decisions in administrative proceedings are generally not final until they have been adopted by the agency. This amendment ratifies the approach taken by the courts in *McDonald* v. *Schweiker*, 726 F.2d 311 (7th Cir. 1983) and *Mass. Union Public Housing Tenants* v. *Pierce*, 755 F.2d 177 (D.C. Cir. 1985).

The Report, in stating that it was following the view of the Administrative Conference, was merely referring to the Administrative Conference's expressed objection to the complete elimination of agency review of fee determinations, and the quoted section suggests nothing about Congress's intent regarding the standard of review.[2]

The decision below, therefore, unjustifiably overturns the congressional choice—expressed in the stat-

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[2] The two decisions cited in the House Report are instructive. Neither decision concerned, or even mentioned, the standard of review. Both cases held that a court decision on the merits is not "final," for purposes of triggering the period under the EAJA within which a fee application must be filed, until after the appeal has been concluded, thereby rejecting the government's contention that the application must be filed within 30 days of the district court's decision. The House Report's reference to these cases as analogous to the 1985 amendment to Section 504 thus reflects the view that, contrary to the government's submission (Br. in Opp. 15), the relationship between the adjudicative officer and the agency on fee applications is analogous to the relationship between the district court and the court of appeals. That analogy strongly suggests that the *Pierce* rule of deference should apply to review by agencies of adjudicative officers' fee rulings just as it applies to court of appeals review of district court decisions.

ute and reflected in the legislative history—to make the adjudicative officer the primary arbiter on fee applications, entitled to the same standard of deferential review accorded to district courts under *Pierce v. Underwood*. Unless this decision flouting the congressional will is reviewed by this Court, a large class of cases will be severed from the consistent framework established by the EAJA and *Pierce*, and attorney's fee claimants in those cases will have to surmount a hurdle that Congress deliberately sought to remove. *See* Pet. 15-16.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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